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Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McIlroy and James Dunlavey,
as Executor of the Estate of
Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas Ozark Society and
Wayfarer Expeditions, Inc. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioners, W. L. McIlroy and James Dunlavey, as Executors of the Estate of Grady R. McIlroy, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 17, 1980.

Opinions Below

The opinion of the Arkansas Supreme Court, reported at 268 Ark. 227, —— SW2d —— (March 17, 1980), appears in the Appendix hereto. The Decree of the Chancery Judge of Franklin County, Arkansas, will not be reported and is also included in the Appendix.

Jurisdiction

The judgment of the Supreme Court of Arkansas was entered on March 17, 1980. A petition for rehearing was denied on April 21, 1980, and a mandate was entered on that date. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Whether the Supreme Court of Arkansas erred in holding the Mulberry Creek a navigable water course of the State of Arkansas, with title to the streambed vested in the State of Arkansas.

2. Whether the Arkansas Supreme Court can, by adopting a new standard for determining navigability, divest reparian owners of title to the bed of a stream clearly nonnavigable under prior law, and vest ownership of the streambed in the State of Arkansas without paying just compensation contrary to the Fourteenth Amendment to the United States Constitution and Article 2, Sections 22 and 23, of the Arkansas Constitution.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution, Article 2, Section 22:

The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

Arkansas Constitution, Article 2, Section 23:

The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the General Assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well-being, but no further.

Arkansas Natural and Scenic Rivers System Act, Act 257, Section 11, 1979, Ark. Stat. Ann. §9-1211 (Supp. 1979):

Protection of private land — Nothing in this Act shall be construed to give the public any greater right or privilege of access to private lands.

Arkansas Natural and Scenic Rivers System Act, Act 257, Section 12, 1979, Ark. Stat. Ann. §9-1212 (Supp. 1979):

The Arkansas Natural and Scenic Rivers Commission shall not have the power of eminent domain.

Statement of the Case

The Petitioners own real property containing a segment of the Mulberry River, known until very recent years as Mulberry Creek. The stream flows through Franklin County, Arkansas, a distance of approximately 55 miles to a point where it empties into the Arkansas River some 35 miles from Fort Smith, Arkansas. A portion of the Mulberry flows through the Ozark National Forest which is located north of Petitioners' property.

The Mulberry consists of long flat pools connected by shallows or rapids. It has an average width of approximately 100 feet and, except at flood stage, there is not a place in the stream with a depth of greater than six feet. There are dry spots in the stream six to eight months out of the year. During rainy seasons, the stream is canoeable and follows a dangerous and torturous course across Petitioners' property. Since 1973, four canoeists have been killed.

Until the meteoric rise in the popularity of canoeing in this area beginning in 1973, the Mulberry was undisturbed by large segments of the populace. However, canoeists became so prevalent on the stream that the riparian owners found it difficult to adequately protect livestock, barns and other private property along the river's edge from isolated incidents of vandalism by unknown third parties. Further, the canoes often capsize, and the canoeists litter and trespass on private property.

This action was initiated under the Arkansas Declaratory Judgments Act, Ark. Stat. Ann. §34-2501 *et seq.* (Repl. 1962), and was initially filed against the Ozark Society and Wayfarer Expeditions, Inc., two groups which had been

particularly active in promoting the Mulberry for the purposes of canoeing and other outdoor recreational activities. The Respondent Wayfarer had been engaged in renting canoes to third parties and in planning float trips over that portion of the stream which traversed Petitioners' property. Petitioners filed their Petition for Declaratory Judgment on June 15, 1978, in Franklin County Chancery Court, praying that the Court declare the Mulberry to be a nonnavigable stream at the point where it intersects Petitioners' property and that the Respondents be restrained from canoeing over the stream at those points without petitioners' consent. The State of Arkansas intervened as a party in the action in order to assert the right of the public to use the waters of the stream. The State had previously taken the position, through its Department of Parks and Tourism and its Game and Fish Commission, that the Mulberry was open to the public for purposes of floating by canoes, by publishing a pamphlet distributed by those agencies entitled "The Float Streams of Arkansas." The Ozark Society had likewise promoted the stream as being open to the public in its pamphlet which was at issue below, "The Mighty Mulberry." It is against this background of commercialization and invasion of the property by the State of Arkansas and by the private Respondents that the Petition for Declaratory Judgment was framed.

The Chancery Judge below held that the Mulberry is a nonnavigable stream and therefore the riparian owners own to the thread of the stream as well as the water in it and have a right to proscribe the water's use for recreational purposes by any other persons. This holding was consistent with a long line of cases decided by the Supreme

Court of Arkansas since statehood that riparian owners of nonnavigable streams own to the thread of the stream. Under Arkansas law as it existed before the supreme court's decision of March 17, 1980, when a riparian owner owned the real property through which a nonnavigable stream flowed or owned both sides of the stream, he owned the entire streambed and could prohibit all float fishing, wading, floating by canoe, or other use of the stream by all other persons without consent. The Petitioners own the real property through which a portion of the stream flows and, as such, owned the streambed, under Arkansas law as it existed prior to this case.

All parties conceded in the chancery court and in the Arkansas Supreme Court that the test for navigability under Arkansas law had always been whether the stream is capable for use commercially; that is, whether the stream is capable of carrying away the commercial products of the fields and forests contiguous to the stream. If it is not, then the stream must be held to be nonnavigable which in turn governs the extent of the rights of riparian owners.

In its decision of March 17, 1980, the Supreme Court of Arkansas, for the first time, declared that recreational use was sufficient to establish navigability. The Court, per Hickman, Associate Justice, acknowledged that this constituted a change in the law as to navigable streams and relied on cases from other jurisdictions which likewise abandoned the commercial use test in favor of the recreational use test. At page 11 of its opinion, the Court stated:

> "There is no doubt that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational pur-

poses. Consequently, we hold that it is navigable at that place with all incidental rights of that determination."

In so holding, the Arkansas Supreme Court divested the Petitioners, and other riparian owners of the Mulberry, of property rights without due process or just compensation. The supreme court cavalierly treated this direct and substantial violation of the Fourteenth Amendment to the United States Constitution as simply "an idea whose time has come." This must be remedied by this Court.

Preservation of Federal Question

The issue of taking property without due process and just compensation was clearly before the Supreme Court of the State of Arkansas. In Petitioners' brief, at pages 34 through 41, the Petitioners urged on the Court the proposition that a reversal by the Supreme Court of Arkansas would constitute a taking of property without just compensation, this in light of the fact that the State of Arkansas has the absolute right to condemn either the fee simple title to the streambed, or a public recreational easement in the streambed upon payment of just compensation, if it so desires. Obviously, the Arkansas Supreme Court rejected this argument in holding that recreational use renders the stream navigable, and that court did not address the issue of whether there was any taking of property without just compensation in violation of the Fourteenth Amendment. The issue was raised in Petitioners' brief under the Arkansas Constitution, but the provision thereof is substantially identical to the federal constitutional guarantee. The strong dissent by Honorable John A. Fogleman, Chief

Justice, chastised the majority for completely evading the constitutional question, evidencing the fact that the dissenting Chief Justice clearly understood the constitutional issue to have been squarely presented before the Court by the Petitioners.

The federal constitutional issue was also specifically raised on petition for rehearing filed by Petitioners on or about April 2, 1980, which was denied by the Arkansas Supreme Court on April 21, 1980.

Reasons for Granting the Writ

I.

The Supreme Court of Arkansas erred in finding that the Mulberry is a navigable stream.

56 Am. Jur. *Waters*, §177 (1947) states:

> It has been stated that the division of waters into navigable and nonnavigable is merely another way of classifying them as public or private, and that navigable water embrace all bodies of water which are public in their nature.

Almost identical language is found in 65 C.J.S. *Navigable Waters*, §1 (1966).

> The trem "public waters" is ordinarily synonymous in a legal sense with "navigable waters", as distinguished from "private waters", the term used to designate nonnavigable waters, and it has been stated that a division of watercourses into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification.

If a stream is nonnavigable, riparian rights extend to the center of the stream. If the owner owns the property on both sides of the stream he also owns the fee in the bed of the stream, including mineral rights. If the body of water is navigable, then the ownership of the bed and with it, the use of the waters, is in the public. 2 Tiffany, *Real Property*, §§661, 663 (3rd Edition); Jones, *Arkansas Titles*, §§345, 349 (1935); *McGahhey v. McCollum, Adm.*, 207 Ark. 180, 179 SW2d 661 (1944); *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378 (1915); *Lutesville Sand and Gravel Company v.*

McLaughlin, 181 Ark. 574, 26 SW2d 892 (1930); *Little Rock, Mississippi River and Texas Railway Co. v. Brooks,* 39 Ark. 403 (1882), and Note, *Real Property — Right to Float Fish Through Another's Land,* 10 Ark. L. Rev. 145 (1956).

The true test for whether a stream is navigable in Arkansas has always been whether the stream is useful commercially. In *Barboro v. Boyle, supra,* the court, quoting *Little Rock, Mississippi River and Texas Railway Co. v. Brooks, supra,* which cited *The Montello* 87 U.S. (20 Wall.) 430 (1874) and *The Daniel Ball* 77 U.S. (10 Wall.) 557 (1870), stated:

> It is not sufficient to impress navigable character, that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this was so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose in some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long . . . The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats, or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round.

The above test has been later cited with approval in

Lutesville Sand and Gravel Company v. McLaughlin, supra, and *Hayes v. State,* 254 Ark. 680, 449 SW2d 372 (1973).

It is evidenced by the citations to *The Montello, supra,* and *The Daniel Ball, supra,* the Arkansas Supreme Court has consistently adhered to the standard of navigability as adopted in the United States by this Court as an extension of the rule of common law England. The question of navigability is oftentimes a federal question, as this Court has stated on many occasions. *See, e.g., State of Utah v. United States,* 403 U.S. 9 (1971); *United States of America v. Hope State Bank,* 270 U.S. 49 (1925). The latter case confirms that the power of government to take nonnavigable streams and make navigable improvements thereon is subordinate to the Fifth Amendment to the United States Constitution, which proscribes such a taking by the United States. Of course, the provision of relevance here is the Fourteenth Amendment which applies the same proscription as to the states.

The Arkansas Supreme Court has never held that float fishing, canoeing, or any other recreational activity, would give rise to a finding of navigability of a stream. The test is a commercial one. "The mere fact that the stream might at times carry single logs or canoes or the average rowboat used by fishermen is not sufficient to establish the navigability of the stream." *In Re River Queen,* 275 F. Supp. 403, 407 (W.D. Ark. 1967), *affirmed, George v. Beavark, Inc.,* 402 F.2d 977 (8th Cir. 1968). In affirming, the Eighth Circuit Court recited at 978 that the sole issue on appeal is whether "float fishing" constituted such commerce and transportation as to characterize the stream in question as navigable. At 981, the court said, "We do not think float or

any other kind of fishing suffices when it is the sole ingredient to constitute navigability of a stream."

From the above authorities, it is clear that neither float fishing nor canoeing is sufficient to bring a stream within the "navigable" label. The test of navigability of the stream at the place in issue is a question of fact. *Barboro, supra,* and *Goforth v. Wilson,* 208 Ark. 35, 184 SW 2d 815 (1945).

The Chancellor before whom this case was tried, under the correct precedential tests, found the Mulberry to be a nonnavigable stream. This finding may only be reversed under Arkansas law if the supreme court finds that it is clearly against the preponderance of the evidence. *LeCroy v. Sigman,* 209 Ark. 469, 1 SW2d 461 (1946). The Chancellor heard testimony from many witnesses for approximately two days and received briefs from all parties before deciding this case. The evidence, including photographs, showed the Mulberry Creek is a small stream which follows a torturous course across Petitioners' lands. At various times of the year there is relatively little water in it except for the larger pools and holes. Shortly after a good rain, it is canoeable with numerous shallows throughout its course. The property in question is approximately twenty-seven miles from the head of navigation at the Arkansas River. The United States Corps of Engineers classifies the point of the stream in controversy as nonnavigable in their literature. During rainy seasons, the creek may be as wide as 115 feet but has an average width of approximately 30 feet to 100 feet. Except at flood stage, there is not a place on the creek where a person six feet tall cannot walk across. No commercial or other traffic has ever used the Mulberry as a "water highway" and until recently, no boats had been

upon it other than those which might be classified as john boats. It has never accommodated motorboats. There were two unsuccessful attempts to float logs on the Mulberry near the turn of the century.

Until 1974 the Mulberry was relatively unknown except by the local residents of its banks and their friends. Due to publication of "The Mighty Mulberry" by the Respondent Ozark Society in 1974, the establishment of the canoe renting business by Wayfarers Expeditions in 1975, and the publication of over 100,000 pamphlets entitled "Float Streams of Arkansas" by the State of Arkansas (which features the Mulberry Creek), the private property of the Petitioners has been publicized and commercialized. There are so many canoeists now using the stream during the spring that Petitioners and their neighbors can no longer enjoy the peaceful and quiet enjoyment of their property as they have in past years. The Petitioner McIlroy and other owners testified that they can no longer use their property for swimming, picnicing, fishing and other family uses due to the sudden appearance of a large number of canoeists from all over the nation. Litter is a growing problem. The State uses the Petitioners' property to promote tourism but accepts no responsibility whatsoever in helping clean up the litter left by the countless number of canoeists.

As recently as 1977, the issue of navigability of the Buffalo River, in North Arkansas, was considered by the Eighth Circuit Court of Appeals. In *Buffalo River Conservation and Recreation Counsel v. National Park Service*, 558 F.2d 1342 (8th Cir. 1977), the court found that the Buffalo is nonnavigable, but upheld the creation of prescriptive easements by adverse possession to travel over the non-

navigable stream and its bed. The evidence in this case clearly reveals the vast difference between the Buffalo and the Mulberry. If the Buffalo is nonnavigable, then *a fortiori*, this much smaller, intermittent stream is nonnavigable also.[1]

Riparian rights are synonymous with private property rights. The court in *Meriwether Sand & Gravel v. State*, 181 Ark. 216, 26 SW2d 57 (1930), said at 181 Ark. 226-228:

> Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold.
>
> . . . Whether the damage to the appellees was great or slight depends largely upon the point of view. In the eyes of those . . . whose value lies only in use, it may so appear; but value lies also in something more, and that is valuable, whatever it may be, in proportion as it tends to promote not only a utilitarian purpose, but also contentment and rational pleasure. Certainly, a trout stream would add considerable value to a farm the brook alone with its shining shallows and its deep quiet pools would necessarily add much to the charm of any farmstead, and considerably enhance its market value. Living water had always been deemed a valuable and desirable thing, and when that is sullied, as in this case, the injury is not slight; but substantial, and of which a court of equity will take cognizance and remedy by its injunctive power. Where the injury is a recurring one, and the damages sustained are of a

[1]The Buffalo National River was established by Pub. L. 92-237, 16 U.S.C. §460-m-9, in 1972. This River has had national prominence for nearly twenty years as a stream especially suited for canoeing.

substantial nature, equity will restrain its continuance by injunction. . . .

McGahhey v. McCollum, supra; McLaughlin v. City of Hope, 107 Ark. 443, 155 SW 910 (1913), and *Kilgo v. Cook,* 174 Ark. 432, 295 SW 355 (1927), demonstrate the previous firm position taken by the Arkansas court in the matter of riparian owners of nonnavigable streams. In *McLaughlin, supra,* p. 447, the court made clear that: "All of the authorities agree that small streams, incapable of navigation, are wholly private property; that the title of riparian owner extends to the middle of the stream." In *Kilgo, supra,* p. 436, the court stated when discussing the parties rights regarding a nonnavigable stream: "he (Appellee) has no more right to trespass on the water over appellant's land where he would be on the land not covered by water.

II.

The decision of the Supreme Court of Arkansas violates the Fourteenth Amendment proscription on taking private property without due process of law and just compensation.

Having heretofore established the law of the State of Arkansas regarding riparian rights and nonnavigable streams, it follows that the decision of the Supreme Court of Arkansas divested the Petitioners of their rights of ownership of the bed of the Mulberry River. The legislature has established the method of eminent domain and it has never been exercised as to the property involved. This taking was done solely by judicial fiat and at the whim of the Arkansas Supreme Court. In 1979, the Arkansas Legislature adopted the Arkansas Natural and Scenic River System Act. This Act specifically provided that nothing in

the Act should be construed to give any greater right or privilege of access to private property, and the Commission did not have the right of eminent domain. By judicial fiat, the Arkansas Supreme Court has done what the Arkansas Legislature refused or was unable to do.

In its brief before the Arkansas Supreme Court, Petitioners argued strongly at pages 34 through 41 that a reversal of the Chancery Judge's decision would constitute a taking of property without just compensation. As pointed out in Petitioners' statement of the case, the Fourteenth Amendment question was clearly raised by Petitioners in their petition for rehearing, but it was denied by the court.

It is clear under the decisions of the Arkansas Supreme Court that the rights of riparian ownership are vested property rights and constitute rules of property. That this line of decisions has been consistent until March 17, 1980 is very graphically demonstrated in the dissenting opinion of Chief Justice Fogleman below. As he pointed out, the commercial use test for navigability was reaffirmed in 1930 by *Lutesville Sand & Gravel, supra,* and as recently as 1973 in *Hayes v. State,* 254 Ark. 680, 496 SW2d 372 (1973). The fact that a riparian owner's property line extends to the middle of a nonnavigable stream has been settled law in this jurisdiction for decades. Potential purchasers, as well as owners, of property along the Mulberry have a right to rely upon these rules of property. The extent of the rules of property is intermeshed with the question of whether the stream is navigable. The Supreme Court of Arkansas cannot simply disregard a rule of property. *Bishop v. Williams,* 221 Ark. 617, 255 SW2d 171 (1973). If the court's holdings have become a rule of property, they may not be overruled retroactively by the court. *O'Brien v. Atlas Finance Co.,* 223

Ark. 176, 264 SW2d 839 (1954); *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 SW2d 973 (1952).

The adoption by the Arkansas Supreme Court of the "modern trend" test of navigability determined by recreational use effectively divested the Petitioners of their property rights which had been fixed by the decisions of the Arkansas Supreme Court virtually since statehood. This was done by the court with no provision for compensation, and in the absence of due process. The issue of taking without compensation was totally ignored by the court, in favor of the "modern trend" as simply an idea whose time had come. To allow this decision to stand is unthinkable, especially in view of the fact that under the Arkansas Constitution, even if a balancing test which considers the private property owner *vis-a-vis* the public were invoked, the rights of private property must prevail under the Arkansas Constitution. This, as Chief Justice Fogleman tersely pointed out, is a case of "judicial submission to public clamor [that] is not in keeping with constitutional government."

The state may not, without compensation, diminish a riparian owner's rights by statutes declaring a river navigable. *People ex rel. Western New York & P. Ry. Co. v. State Tax Commission,* 244 N.Y. 596, 155 NE 911 (1927); *State v. Brace,* 76 N.D. 314, 36 NW2d 330 (1949). Certainly if this cannot be done by legislative enactment, it cannot be done as an exercise of raw judicial power as the Arkansas Supreme Court has undertaken. *See, also, Bino v. City of Hurley,* 273 Wis. 10, 76 NW2d 571, 56 A.L.R. 2d 778 (1956); *Petraborg v. Zontelli,* 217 Minn. 536, 15 NW2d 174 (1944).

This court has had recent occasion to consider precisely the situation that is now before it. *Kaiser Aetna v. United*

States, —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) involved the question whether Kuapa Pond on the island of Oahu, Hawaii had been rendered navigable by certain acts acquiesced in by the United States Army Corps of Engineers. This court found that under Hawaiian law such ponds as Kuapa had always been considered private property and, therefore, the holding of the United States Court of Appeals of the Ninth Circuit that the pond was subject to public access because of the navigational servitude of the United States was reversed. This court simply would not sanction a decision by a lower court which divested property rights of longstanding under state law, holding:

> that the "right to exclude," so universally held to be fundamental element of the property right, falls within this category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. [Footnote and citations omitted] . . . thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after Petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power in paying just compensation, require them to allow free access to the dredged pond. . . .

The omitted footnote quotes Justice Brandeis' dissent in *International News Serv. v. Associated Press,* 248 U.S. 215 (1918), that "an essential element of individual property is the legal right to exclude others from enjoying it." That is

precisely the right the Petitioners had prior to the decision of the Supreme Court of Arkansas that is complained of here. For prior to this decision, ownership of opposite banks of a nonnavigable stream constituted ownership of the stream, just as if it were a pond or private lake, as in *Kaiser Aetna.*

Not only had the Petitioners been denied the legal right to exclude others from enjoying the nonnavigable stream which flowed through their property, but they have been denied any voice whatsoever, except that that adheres to any citizen of the State of Arkansas. As was urged upon the Arkansas Supreme Court below in Petitioners' Petition for Rehearing, the effect of the decision of the Arkansas Supreme Court was to divest the Petitioners of title to the streambed and vest title in the State. This decision likewise vests title to all minerals and mineral rights in and under the streambed in the State. Predictably, within a few weeks after the mandate from the Arkansas Supreme Court, oil and gas lease applications were filed with the State for mineral leases to the streambed of the Mulberry pursuant to the Arkansas Supreme Court's decision. The decision not only divests the Petitioners of the right to own and lease the mineral rights under the surface, but also precludes them from being able to sell or remove gravel from the streambed. This is a common practice in Arkansas and a common benefit of riparian ownership of nonnavigable streams.

Conclusion

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of the State of Arkansas. Clearly, that court has decided a federal question of sub-

stance in a way not in accord with applicable decisions of this court. Moreover, this court should reverse, upon review, and enter judgment affirming the decision of the Chancellor for Franklin County, Arkansas, that the Mulberry Creek is nonnavigable. Although the defending chief justice below would have reversed the Chancellor on the ground that a prescriptive easement had been obtained, that would be an improper result under Arkansas law. Whether a prescriptive easement obtains is a question of fact, and the Chancellor cannot be reversed, unless clearly against the preponderance of the evidence. It is apparent that the majority of the Arkansas Supreme Court felt that the case could not be decided upon prescriptive easement grounds since they totally ignored that aspect, and decided it on the basis of simply divesting the Petitioners of their property rights in violation of the constitutions of the United States and of Arkansas. It is a firmly intrenched doctrine that constitutional questions will not be reached unless the case cannot possibly be decided upon other grounds, 2 Am. Jur. 2d *Administrative Law*, §649 (1962). Therefore, this case must rise or fall upon the limited question whether the Arkansas Supreme Court, unlike the legislative and executive branches of government, will be allowed to divest Petitioners of property rights without due process and just compensation. We trust that this court will agree with us that it cannot do so.

Respectfully submitted

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APPENDICES

APPENDIX "A"

OPINION OF THE ARKANSAS SUPREME COURT AND DISSENT

SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

Opinion Delivered March 17, 1980
An Appeal from the Franklin County Chancery Court
Ozark District

RICHARD MOBLEY, *Chancellor*

Reversed.

DARRELL HICKMAN, *Associate Justice*

W. L. McIlroy and his late brother's estate, owners of 230 acres in Franklin County, sought a chancery court declaration that their rights as riparian landowners on the Mulberry River were, because the stream was not a navigable river, superior to the rights of the public.

McIlroy joined as defendants the Ozark Society, a conservationist group, and two companies that rent canoes for use on the Mulberry and other Ozark Mountain streams. The State of Arkansas, intervening, claimed Mulberry was a navigable stream and the stream bed the property of the State, not the McIlroys.

The Ozark Society and the other defendants generally claimed that the Mulberry was a navigable stream but that even if the court found otherwise, a public easement in the Mulberry should be recognized. The defendants also argued that the public had acquired a prescriptive easement in the river and that the act admitting Arkansas into the Union placed the Mulberry in the public domain.

The chancellor declared the Mulberry was not a navigable stream. He found the McIlroys owned it as riparian property owners with the incidental right to prevent the public from using the stream (the McIlroys owned land on both sides of the Mulberry.) He declined to enjoin the Ozark Society from the publication of "The Mighty Mulberry," a brochure proclaiming the Mulberry as an excellent stream for canoeing.

The State, the Ozark Society and one of the canoe suppliers appealed. Their essential allegations of error are that the chancellor was wrong in his determination that the Mulberry was not navigable and in failing to find the existence of a public or prescriptive easement. The Arkansas Canoe Club and the Arkansas Farm Bureau Federation each filed an amicus curiae brief. The canoe club generally supported the appellants and also asked us to declare almost every other similar stream in Arkansas navigable. The Farm Bureau's brief supported the claims of the appellee landowners.

As we define the term "navigable" we find the Mulberry River, as it passes through McIlroy's property, to be navigable. Consequently, we reverse the chancellor's decree in that regard. Our decision precludes the necessity to discuss any of the other issues raised on appeal.

The Mulberry River, located in northwest Arkansas, heads up in the Ozark Mountains and flows in a westerly direction for about 70 miles until it joins the Arkansas River. It could best be described as an intermediate stream, smaller than the Arkansas River, the lower White and Little Red Rivers and other deep, wide rivers that have been used commercially since their discovery. But neither is it like the many small creeks and branches in Arkansas that cannot be regularly floated with canoes or flatbottomed boats for any substantial period of time during the year. The Mulberry is somewhere in between. It is a stream that for about 50 or 55 miles of its length can be floated by canoe or flatbottomed boat for at least six months of the year. Parts of it are floatable for longer periods of time. The Mulberry is a typical rock-bottomed Ozark Mountain stream, flowing with relatively clear water and populated by a variety of fish. Smallmouth bass favor such a stream and populate the Mulberry.

For most of its distance it is a series of long flat holes of water interrupted by narrower shoals. These shoals attract the canoeists. McIlroy describes the stream as following a torturous course; canoeists find it an exciting stream testing the skill of an experienced canoeist. Watergaps, affairs of wire or boards erected across the stream to hold cattle, have at times been erected but, according to W. L. McIlroy, they go down with the first rise of water. It is not a stream easily possessed. In recent years, the Mulberry has claimed the lives of several canoeists.

Annually, since 1967, the Ozark Society has sponsored for its members one or more float trips on the Mulberry River. These trips take them through McIlroy's property, which is located about 23 miles up the river from where

the Mulberry enters the Arkansas. McIlroy said he had a confrontation with Ozark Society members in 1975 when about 600 people put in at a low water bridge on his property. The bridge, near Cass, serves a county road, and is undisputably a public bridge. Canoeists and fishermen have regularly used it as an access place to the river.

Although we are aware of the general characteristics of the river, we must here only determine the navigability of the Mulberry as it flows through the appellees' property. The chancellor faced this issue and ruled the river non-navigable. We reverse his decision and hold that the Mulberry River is navigable. While our decision will be a precedent for this river and should be used by the public and landowners as such, of necessity the judgment is directed only to the parties to this lawsuit.

This is essentially a lawsuit about the river as it passes through McIlroy's property. W. L. McIlroy testified that just below the bridge is a long hole of water, perhaps the longest on that stretch of the river, which is about 100 feet wide; it narrows to a shoal. He said a man could wade the water almost any time of the year. He claimed the river could sometimes not be canoed for an entire year. He said dry spots usually existed for six to eight months of the year. He denied seeing a canoe before 1974. However, from 1947 to 1971, McIlroy was in California. During that time he would spend only a week or so a year in Arkansas.

The great preponderance of the evidence conflicts with McIlroy's estimate of the river. It is floatable for at least six months of the year. According to a pamphlet, "The Float Streams of Arkansas," published by an Arkansas state agency, the floating season is October through June. This is for a course from a point considerably upstream from

McIlroy's property to the river's mouth, a distance of about 50 miles. Numerous canoeists testified they had floated the Mulberry through the Cass area, mostly in the spring of the year. It was not disputed, however, that at times, usually in the summer months, the Mulberry could not be floated.

The evidence by testimony and exhibits demonstrates conclusively that the Mulberry had been used by the public for recreational purposes for many years. It has long been used for fishing and swimming and is today also popular among canoeists.

Seven witnesses from the locality testified. All testified they had fished or swum in the Mulberry at this locality and had never sought permission nor thought they needed it. It is only necessary to summarize some of their testimony. Thelma Smee, 51, said she was born on the McIlroy property and that people had fished up and down the Mulberry all her life. She never thought of having to get permission; nor she said would anyone expect even a total stranger to get permission to fish or swim. Curtis Childers, 66, born near the Mulberry, said four generations of Childerses, never having to get permission, have swum and fished the Mulberry. He recalled canoes on the river as early as 1967. Gary Turner, 36, grew up on the Mulberry at Turner Bend. His father, who owned a grocery store on the river, started a vehicle shuttle service for canoeists in the late 1950's or early 1960's. He had floated the Mulberry numerous times and never sought permission or felt he needed it. The Turners are still landowners on the Mulberry.

Fasie Toris lived near the Mulberry all her life, annually floating this segment of the Mulberry with her family

numerous times. She never got permission nor felt anyone needed it. She concluded, "You may own the land but you don't own the water."

Several state and federal officials testified. Richard Davies, Director of Arkansas State Parks and Tourism, said his agency, along with the Arkansas Game and Fish Commission, published, in 1978, a pamphlet, "The Float Streams of Arkansas," listing 14 of Arkansas' most popular fishing and canoeing streams. The Mulberry was touted as Arkansas' finest white water float stream and as an excellent habitat for smallmouth bass. Davies said he considered the water open to the public. George Purvis of the Arkansas Game and Fish Commission said the Mulberry was included in the phamphlet because it was one of the top five or six streams in the state for both floaters and fishermen. He also considered it open to the public. William E. Keith, an employee of the Game and Fish Commission, said fish were stocked on the Mulberry periodically from 1952 through 1977, sometimes at the low water bridge at Cass.

Nineteen canoeists testified and three others' testimony was offered by stipulation. All had floated the Mulberry, most several times; some numerous times. None had ever sought permission nor thought they needed it. No one's right to canoe was challenged until McIlroy challenged some of them in 1978. Harold Hedges began floating it in 1952, with about 20 other people. Most canoeists had floated the Mulberry in the 60's and 70's. Evidence showed the Ozark Society, a conservationist group, had sponsored floats annually from 1967 to 1978.

Besides McIlroy's testimony, several other local landowners testified or their stipulated testimony was presented. Woody Woolsey, who had lived most of his life next to the

river, said he considered the stream private. He said he first saw a canoe in 1974. George Freeman, living nearby for 50 years, said he expected people to get permission to use the stream. He considered the stream private property.

Al Wiederkehr bought land on the Mulberry in 1966 and agreed he thought the Mulberry private property. He said his land was posted. The former sheriff of Franklin County, W. D. Gober, who built a cabin on the McIlroy property, said he first saw canoes in 1974. The testimony of five others was offered to the effect that the Mulberry was private property or used only with permission.

The original government plat made of this area in 1838 was introduced and shows the "Mulberry Creek" was "meandered" by the surveyors. Meander lines are those representing the border line of a stream and such lines are considered prima facie evidence of navigability. *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930).

The facts presented prove that the Mulberry River at the point in question is capable of recreational use and has been used extensively for recreational purposes. We must now decide whether such a stream is navigable.

Determining the navigability of a stream is essentially a matter of deciding if it is public or private property. See, *State v. Korrer,* 127 Minn. 60, 148 NW 617, supp op 127 Minn. 77, 148 NW 1095 (1914). Navigation in fact is the standard modern test of navigability, and, as embroidered by the federal courts, controls when navigation must be defined for federal purposes — maritime jurisdiction, regulation under the Commerce Clause, and title disputes between the state and federal governments. See, *Hitchings v. Del Rio*

Woods Recreation & Park District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); *Day v. Armstrong,* 362 P.2d 137 (Wy. 1961). Otherwise, the states may adopt their own definitions of navigability. *Donnelly v. United States,* 228 U.S. 243 (1913).

While navigation in fact is widely regarded as the proper test of navigability, *St. Louis, Iron Mountain & Southern Railroad Co. v. Ramsey,* 53 Ark. 314, 13 SW 931 (1890), it is a test which should not be applied too literally. For example, it has been said a stream need not be navigable at all its points or for the entire year to be navigable. *Economy Light & Power Co. v. United States,* 256 U.S. 113 (1921). The real issue in these cases is the definition of navigation in fact.

Arkansas has adopted the standard definition of navigability. *Lutesville Sand & Gravel Co. v. McLaughlin, supra.* That test, which was similar to the general test used by the federal courts, defines navigability in terms of a river's potential for commercial usefulness; that is, whether the water could be used to remove the products of the surrounding land to another place. That definition reads:

> . . . Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or

> bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round. (Citing authorities). *Id.* at 576-77.

Therefore, a river is legally navigable if actually navigable and actually navigable if commercially valuable.

However, in the case of *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915), this Court foresaw, no doubt, that things would change in the future and that recreation would become an important interest of the people of Arkansas. The language in the *Barboro* case is almost prophetic. While adhering to the standard definition of navigability, with its dependence upon a commercial criterion, the Court went on to say:

> It is the policy of this state to encourage the use of its water courses for any useful or beneficial purpose. There may be other public uses than the carrying on

> of commerce of pecuniary value. The culture of rice is being developed in this state and the waters of the lake could be used for the purpose of flooding the rice fields and for other *agricultural purposes.* As the population of the state increases, the banks of the lake may become thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. *Moreover, the waters of the lake might be used to a much greater extent — for boating, for pleasure, for bathing, fishing and hunting than they are now used.* [Emphasis added]. *Id.* at 382-383.

Since that time no case presented to us has involved the public's right to use a stream which has a recreational value, but lacks commercial adaptability in the traditional sense. Our definition of navigability is, therefore, a remnant of the steamboat era.

However, many other states have been presented with this same problem. Back in 1870, the Massachusetts Supreme Court found a stream navigable that could only be used for pleasure. The stream was about two feet deep at low water. The Court stated:

> If water is navigable for pleasure boating, it must be regarded as navigable water though no craft has ever been upon it for the purpose of trade or agriculture. *Attorney General v. Woods,* 108 Mass. 436, 440 (1870).

In Ohio, the court recently was faced with this problem and decided to change its definition of navigation. The Ohio Court said:

> We hold that the modern utilization of our water by

> our citizens requires that our courts, in this judicial interpretation of the navigability of such water, consider this recreational use as well as the more traditional criterion of commercial use. *State, ex rel v. Newport Concrete Co.,* 44 Ohio App. 2d 121, 127, 73 Ohio Ops. 2d 124 (1975).

Applying a "public trust" to the Little Miami River, the Ohio court found that the State of Ohio ". . . holds these waters in trust for those Ohioans who wish to use the stream for all legitimate uses, be they commercial, transportational, or recreational." *State, ex rel v. Newport Concrete Co., supra.*

Michigan reached a similar conclusion in 1974. Navigability in Michigan was significantly affected by whether logs had been, or could be, floated down a stream. That "floatable test" had been used by the Michigan court until it was confronted with the same problem that we have. Michigan readily admitted that its definition needed to be changed:

> We therefore hold that members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft. *Kelley, ex rel MacMullan v. Hallden,* 51 Mich. App. 176, 214 NW2d 856, 864 (1974).

For examples of other states that have adopted similar definitions of navigation, see: *People v. Mack,* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds,* 153 Or. 625, 56 P.2d 1158 (1936).

Arkansas, as most states in their infancy, was mostly concerned with river traffic by steamboats or barges when cases like *Lutesville,* supra, were decided. We have had no case regarding recreational use of waters such as the Mulberry. It may be that our decisions did or did not anticipate such use of streams which are suitable, as the Mulberry is, for recreational use. Such use would include flatbottomed boats for fishing and canoes for floating — or both. There is no doubt that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational purposes. Consequently, we hold that it is navigable at that place with all the incidental rights of that determination.

McIlroy and others testified that the reason they brought the lawsuit was because their privacy was being interrupted by the people who trespassed on their property, littered the stream and generally destroyed their property. We are equally disturbed with that small percentage of the public that abuses public privileges and has no respect for the property of others. Their conduct is a shame on us all. It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream. The McIlroys' rights in this regard are not affected by our decision. While there are laws prohibiting such misconduct, every branch of Arkansas' government should be more aware of its duty to keep Arkansas, which is a beautiful state, a good place to live. No doubt the state cannot alone solve such a problem, it requires some individual effort of the people. Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property

owners, than we could close a public highway for similar reasons.

In any event, the state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it.

Reversed.

Fogleman, C.J., dissents.

SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

Opinion Delivered March 17, 1980

APPEAL FROM FRANKLIN CHANCERY COURT
OZARK DISTRICT

RICHARD MOBLEY, *Chancellor*

CONCURRING IN PART
DISSENTING IN PART

JOHN A. FOGLEMAN, *Chief Justice*

I cannot join in the court's new definition of navigability, even though I concur in the reversal of the decree in this case. My disagreement is based upon the court's departure from two overriding and interrelated legal principles, i.e., the effect of a rule of property and the vesting of property rights.

Never before in Arkansas, has determining the navi-

gability of a stream been essentially a matter of deciding if the water is public or private property. Quite the reverse — the rights of riparian owners have depended upon the test of navigability. Although it may be rather loosely said that a body of water that has been meandered in a government survey of the stream is prima facie navigable, the question is determined under local law and not by the surveyors. In *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, 26 SW2d 892, we treated this matter by reference to *Harrison v. Fite*, 78 C.C.A. 447, 148 F. 781 (1906), saying:

> * * * This case involved the navigability of Big Lake and Little River in this State, and affirmed the decree of the circuit court of the United States for the Eastern District of Arkansas (148 Fed. 781) holding that those waters were not navigable. Much that was said in the opinion in that case is relevant here, and upon the question of meandered streams it was there said: "The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at the time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the United States has disposed of lands bordering upon a meandered unnavigable water course or lake, by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to the lands within the meander lines (*Niles v. Cedar Point Club*, 175 U.S. 300, 20 S.Ct. 124, 44 L.Ed. 171) it has nothing left to convey; and whether the title to the bed of the waters is in the State or passes to the grantee in

> the patent is determined by the local law. (*Lamprey v. Minnesota,* 52 Minn. 181, 53 NW 1139, 18 L.R.A. 680, 38 Am. St. Rep. 541). * * * Courts take judicial notice of the navigable character of our important rivers and inland lakes — those that are so within our common knowledge; but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such case the burden of proof rests upon him who asserts the existence of the public servitude."

The majority, however, makes too much of the statement that the fact that surveyors meandered a stream is prima facie evidence of navigability. If so, that prima facie effect seems to vanish when contrary evidence is introduced. It is quite clear that the burden of proving navigability is upon the party asserting it, and it seems that the burden of proving the public servitude is upon the party asserting its existence, regardless of the fact that the body of water is meandered in the government survey. *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks,* 39 Ark. 403, 43 Am. Rep. 277; *Lutesville Sand & Gravel Co. v. McLaughlin,* supra; *Harrison v. Fite,* supra. The effect of those decisions really is that the fact that the surveyors meandered the stream is of evidentiary value on the issue. The real significance of that fact is put in proper perspective in *McGahhey v. McCollum,* 207 Ark. 180, 179 SW2d 661, where we said that it is *merely a circumstance* tending to show navigability. It is also clear that once navigable does not mean always navigable. *Five Lakes Outing Club, Inc. v. Horseshoe Lake Protective Ass'n,* 226 Ark. 136, 288 SW2d 942; *Parker v. Moore,* 222 Ark. 811, 262 SW2d 891.

The majority treatment of *Barboro v. Boyle,* supra, as

a prophecy of a new test of navigability, is certainly not warranted, in view of the fact that this court fifteen years later, in *Lutesville,* treated that case as an application and approval of the long-standing Arkansas test of navigability. The language quoted from *Barboro* in the majority opinion is nothing more or less than a recitation of uses that might be made of the waters of Horseshoe Lake as a navigable stream. It followed a statement that it was the policy of this State to encourage the use of its water courses for any useful or beneficial purpose. This court certainly was not prophesying a new or modern test of navigability in *Barboro,* and any notion that it was is dispelled, not only by the statement in *Lutesville,* but by the opinion in *Barboro* itself, in which it was held that Horseshoe Lake was navigable within the meaning and spirit of our former decision, because it was susceptible of use for commercial navigation, even though it had never been utilized for that purpose except at irregular intervals. In 1953, this court again recognized the viability of the test of commercial potential. *Parker v. Moore,* 222 Ark. 811, 262 SW2d 891. We applied the *Barboro* test as late as 1973 in *Hayes v. State,* 254 Ark. 680, 496 SW2d 372.

We have never, in any subsequent decision, prior to today's, considered that *Barboro* did more than hold that susceptibility to use for commercial navigation, rather than a history of such use is the true test of navigability. This was recognized in *McGahhey v. McCollum,* supra. In *Barboro* itself, we merely gave effect to the holding in *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks,* supra, that the test was "usefulness" of the stream to the population of its banks as a means of carrying off the products of their fields and forests or bringing to them articles of merchandise.

In 1930, long after the decision in *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378, we said that the law on the subject had long been at rest in this State and pointed out that the test announced in *Little Rock, Miss. River & Tex. R.R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277, had been consistently followed. That test, as quoted in and approved in both *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, and *Barboro v. Boyle*, supra, was:

> * * * Nor is it any objection to the public easement for navigation; that riparian proprietors of lands, along fresh waters, own to the thread of the stream. Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot

be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round. (Citing authorities).

The rights of riparian owners have always been considered as vested property rights in this State. As early as 1927, we considered that it was well settled that owners of land bordering on a nonnavigable stream, the boundary lines of which were meandered by the government survey, acquired title to the middle or thread of the stream. *Kilgo v. Cook,* 174 Ark. 432, 295 SW 355; *Goforth v. Wilson,* 208 Ark. 35, 184 SW2d 814. The ownership in fee and control of a riparian owner extend to that part of the surface of the stream that lies above that portion of the bed owned by him. *Medlock v. Galbreath,* 208 Ark. 681, 187 SW2d 545.

Where persons have acquired property rights upon the faith and credit of prior judicial decisions, those decisions and the rights acquired thereunder should not be disturbed. *Hobbs v. Lenon,* 191 Ark. 509, 87 SW2d 6. At least one owner, A. Weiderkehr, acquired property on the Mulberry thinking that the waters were private, and he was justified in doing so under our prior decisions.

A settled legal principle governing the ownership and devolution of property is a rule of property. Decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title are rules of property. *Gibson v. Talley,* 206 Ark. 1, 174 SW2d

551. A rule of property so established should not be disturbed. *Fisher v. Cowan,* 205 Ark. 722, 170 SW2d 603.

The test of navigability is the means of determining the property rights of riparian owners. As such it is a rule of property.[1] To repudiate this rule of property by judicial decision will have the effect of invalidating titles that were acquired in reliance upon the rule and such a change, if desirable, should be brought about by legislation, which operates only prospectively and cannot upset titles already vested. See, *Eubanks v. McDonald,* 225 Ark. 470, 283 SW2d 166; *Pyron v. Blanscet,* 218 Ark. 616, 238 SW2d 636. We are not free to disregard a rule of property. *Bishop v. Williams,* 221 Ark. 617, 255 SW2d 171. Where our holdings have become a rule of property, they must not be overruled retroactively or retrospectively. *O'Brien v. Atlas Finance Co.,* 223 Ark. 176, 264 SW2d 839; *Hare v. General Contract Purchase Corp.,* 220 Ark. 601, 249 SW2d 973.

Even a legislative enactment cannot destroy vested rights which riparian owners have in a nonnavigable stream. *State v. Brace,* 76 N.D. 314, 36 NW2d 330 (1949); 65 CJS 78, Navigable Waters, §7(b). And the legislature could not by a retroactive definition of navigability transfer to the state a property right either in a body of water or the bed thereof that has been previously acquired by a private owner. *Ozark-Mahoning Co. v. State,* 76 N.D. 464, 37 NW2d 488 (1949); *State v. Brace,* supra; 67 CJS 79, Navigable Waters, §7(b). To do so without compensation is unthinkable. *Ozark-Mahoning Co. v. State,* supra; *State v. Brace,* supra; 78 Am. Jur. 2d 517, §68 and cases cited. See, 65 CJS

[1]**United States v. Wilson & Co., 214 F. 630 (E.D. Ark.) aff'd. sub nom. Wilson & Co. v. United States, 142 C.C.A. 351, 227 F. 82 (8th Cir.), aff'd. 245 U.S. 24, 385 S.Ct. 21, 62 L.Ed. 128 (1917).**

78, Navigable Waters, §7(b); *Downes v. Crosby Chemicals, Inc.*, 234 So.2d 916 (Miss. 1970). What this court said over a century ago in *Martin Ex Parte*, 13 Ark. 198, when we had no specific constitutional prohibition against the taking of private property without just compensation, is particularly appropriate here, viz:

> * * * The right of the citizen to acquire, possess and protect property, thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the government of their own creation, and designed to protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound, if the legislative department possesses the power to divest him of it without adequate compensation, through caprice, or even in the exercise of honest but misguided judgment, or, upon that most dangerous of all pretences, for State reasons, and the policy of promoting what may be deemed the public good.

The adoption of a so-called modern test changes a rule of property and apparently divests titles that have been vested under the prior test. In Arkansas, unlike communist states, it is the right of private property, not the rights of the public, that rises above constitutional sanction. Article 2, §22, Constitution of Arkansas. This is one of the fundamental distinctions between our system and the communistic form of government and its focus is directed to public rights asserted in streams. *Downes v. Crosby Chemicals, Inc.*, supra. The statement that the right of property is before and higher than any constitutional sanction is more than a slogan. It has found application in our decisions. See, *City of Fayetteville v.*

S & H, Inc., 261 Ark. 148, 547 SW2d 94; *Arkansas State Highway Com'n v. Turk's Auto Corp., Inc.*, 254 Ark. 67, 491 SW 2d 387; *Blundell v. City of West Helena*, 258 Ark. 123, 522 SW2d 661; *Poole v. State*, 244 Ark. 1222, 428 SW2d 628; *City of Little Rock v. Raines*, 241 Ark. 1071, 411 SW2d 436; *Sheet Metal Workers Int. Ass'n v. E. W. Daniels Plumbing & Heating Co.*, 223 Ark. 48, 264 SW2d 597; *Young v. Gurdon*, 169 Ark. 399, 275 SW 890. The prohibition against the taking, appropriation or damaging of private property without just compensation is binding on all branches of government. The judicial branch is no more vested with the power to take, appropriate or damage the established property rights of individuals without compensating them than is the executive branch. And yet the apparent effect of this decision accomplishes that very result. I submit that, insofar as titles vested under the test of navigability applied up until this very date, the change of the test is a violation of due process of law under both the state and federal constitution, as well as Art. 2, §§22 and 23 of the Arkansas constitution. Judicial submission to public clamor is not in keeping with constitutional government.

Less than four months ago, the Supreme Court of the United States held that the government could not give the public a right of access, or prevent the owners from denying public access, to waters which had been private property under state law, without paying just compensation to the owners, even though the character of the waters had been changed from nonnavigable to navagable. *Kaiser Aetna v. United States*, —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979). What we said in *Shellnutt v. Arkansas State Game & Fish Com'n*, 222 Ark. 25, 258, SW2d 570, applies here, viz:

> It is not necessary that the property should be completely taken in order to bring the case within the protection of this Constitutional guaranty.[6] * * *

[6]Under this Constitutional guaranty, we have held that dumping sewage into a stream and polluting the waters thereof was a damage to a lower riparian owner, and such owner was entitled to recover damages, under the quoted Constitutional provisions. See, **McLaughlin v. Hope,** 107 Ark. 442, 155 SW 910, 47 L.R.A., N.S. 137. Again, we held that the pollution of the air over private property by offensive odors escaping from a sewer tank, was a damage to adjacent residential property, within the quoted Constitutional provisions. See, **Sewer Dist. v. Fiscus,** 128 Ark. 250, 193 SW 521, L.R.A. 1917D, 682.

The matter had been put in sharp focus in *Meriweather Sand & Gravel Co. v. State,* 181 Ark. 216, 26 SW2d 57, where we said:

> * * * Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold.

It is distressing to me that the concern of this court for private property rights so recently and forcibly applied in such cases as *Loyd v. Southwest Arkansas Utilities Corp.,* 264 Ark. 818, 580 SW2d 935, and *Robinson v. Arkansas State Game & Fish Com'n,* 263 Ark. 462, 565 SW2d 433, seems to have stopped at the banks of the Mulberry River (Creek?).

Acquisition by prescription, or adverse possession, cannot be based upon hunting and fishing (or presumably swimming) upon the stream. This question was put to rest in *State ex rel Thompson v. Parker,* 132 Ark. 316, 200 SW 1014, where we said:

> * * * Occasional or oft-repeated incursion upon the lands of another for the purpose of hunting and fishing does not signify any intention to appropriate the lands

> to one's own use. The act of hunting and fishing on the unenclosed lands of another is not an act of possession. It does not denote any purpose to hold the same adversely, and thereby exclude the owner from dominion over his property, and it does not have any such effect. * * *

See, also, *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378; *Medlock v. Galbreath,* 208 Ark. 681, 187 SW 545. On the other hand, any use of the water of a nonnavigable stream for boating purposes by one other than the owner is an infringement of the rights of the owner. See, *Medlock v. Galbreath,* supra.

I find that the record discloses that the public has acquired an easement to use of the Mulberry River across the lands of the appellees by prescription just as fully as they would have acquired an easement for vehicular traffic across their riparian lands by adverse use for more than seven years after appellees should have known that the public use was adverse. That such an easement may be acquired by prescription was recognized in *Buffalo River Conservation & Recreation Council v. National Park Service,* 558 F.2d 1342 (8th Cir. 1977), in reliance upon *Clinton Chamber of Commerce v. Jacobs,* 212 Ark. 776, 207 SW2d 616 (1948); *Howard v. State,* 47 Ark. 431, 2 SW 331; *Patton v. State,* 50 Ark. 53, 6 SW 227; *McClain* [*McLain*] *v. Keel,* 135 Ark. 496, 205 SW 894.

In 1967, W. R. McIlroy and his brother Grady, acquired the farm located at the low water bridge on Mulberry Creek from their father who died July 9, 1971. The farm had been owned by someone in their immediate family since 1927. A crop has been planted on it each spring. Cattle have been kept on the farm and a portion of it is in pasture. There were

three houses and there were sharecroppers who lived on the land. A man named James Jones presently lives in a house on the farm that is over 100 years old. Activity on the river can be observed from portions of the McIlroy fields.

There have been at least one, sometimes two or three, scheduled floats on the Mulberry River conducted by the Ozark Society every year beginning with the summer of 1967 and extending through the winter of 1977-1978. Harry Crisson had floated through the McIlroy property in April of each of the years 1965, 1967, 1972 and 1973. In 1965, there were 19 or 20 people on the same trip. Nancy Jack, a free-lance writer, had floated through the property five times. On the first trip, which was in 1964, 20 people were with her. On the second trip in May, 1965, 19 were with her. In 1967, there were about 26 people on the trip. Curtis Childers, who said he had been on the Mulberry a thousand times in his 66 years, testified that people commonly used the Mulberry. He recalled boating on the Mulberry from the "thirties" until the present. He first began noticing canoes on the river in 1967 and had seen them every year since then. At first there would be one or two on one day and three or four the next, but there are a "bunch more" now. He felt that it was the tradition of the area to float without permission. Donald Rice of Altus had floated through the property two or three times a year beginning in 1960 or 1961. William E. Keith, Jr., Chief of the Fisheries Division of the Arkansas Game & Fish Commission, testified that fish had been "stocked" periodically at the low water bridge from 1952 to 1977. Douglas Tims first floated through the McIlroy property in April, 1972, and had floated it about 30 times a year since then. Arthur Foy Evans, a Gravette dentist, first floated through the McIlroy property in 1967

and, except for two years that he was in military service, floated the river through the property every year thereafter. Bob McCoy had floated through the property four or five times during the past eight years. Harold Hedges of Concord kept logs of his floats. He had floated through the property on the following dates: Oct. 20 and 21, 1952; April 19, 1964; April 3 and 4, 1965; May 31, 1965; April 29 and 30, 1967; April 28 and 29, 1969. On the last date, he had lead a party of 20 or 25 people on a three-day Mulberry excursion at the request of the Forest Service. Leonard Heman had floated through the property on May 31, 1965 and in April, 1967, with 10 to 20 persons. Norman C. Preston had floated through the property in April, 1964 and May, 1965. There were 12 other people with him on the first trip and 23 on the second. Ray Fuller floated through the property in 1967 and once each spring over the next nine years. Melvin Smith floated through the property in 1964. His next trip was in April, 1965, as one of 18 people. In May of 1967, he again floated through the property in a party of eight. His next trip was in 1972. He said that in 1973 he was one of a party of 11 people who floated through the property. In 1975, he was in a float party of 30 people in 16 canoes. Dr. John Ewing first floated through the property in May, 1965 and averaged two trips a year until five years prior to trial, when he moved to Ozark and took the float trips more frequently. Fasie Torix had floated through the property 10 to 20 times per year over the past 30 years. Jesse Jones, who had lived along the river for 13 years, first saw a canoe on the river in the early 1950's. He said that canoes had been coming through since 1966, and that the canoe traffic had increased every year. Joseph Acuff had a record of 12 float trips spanning the years 1965 through 1976. On most of the trips,

the low water bridge was either the "put-in" point or the "take-out" point.

Gary Turner had floated through the property several times a year. A shuttle service for canoeists was started by his father at the father's grocery store and service station in the late 1950's or early 1960's. The operation continued until a year or two before the trial. Over the period of time, the Turners shuttled over 1000 cars.

David Thrasher, a Fayetteville engineer who is president of the Arkansas Canoe Club, first floated through the property in 1970, and has averaged two or three trips per year since then. Stewart Noland was a member of parties numbering 2 to 12 persons which had floated through the property nearly every spring beginning in 1971. He had taken two such canoe trips in the fall.

The notoriety of the use made of the stream is evidenced by the publication of "The Float Streams of Arkansas," beginning in the spring of 1978 by the Arkansas Game & Fish Commision and the Arkansas Department of Parks & Tourism, listing the Mulberry River for a distance of 55 miles from the Arkansas River as one of those streams.

The chancellor held that canoeing constituted only an occasional trespass and that the right to use the stream had been asserted or brought home to the landowner within the period of limitations. I respectfully disagree. It is true that McIlroy and others denied knowing of the use being made of the stream for as long as seven years. The absence of W. M. McIlroy from the area during the early use of the stream by canoeists will explain his professed ignorance of the facts to some extent. There is evidence from which it might be said that the use which began about 1952 was permissive.

That use steadily increased, and must have been obvious to anyone who observed the stream from the McIlroy farm. A use that originates as a permissive use may be treated as adverse and becomes an absolute right to a passageway, not only when it continues openly for seven years after the landowner has knowledge that the use is adverse to his interest, but alsc when the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse. *Weigel v. Cooper,* 245 Ark. 912, 436 SW 2d 85; *McGill v. Miller,* 172 Ark. 390, 288 SW 932; *Fullenwider v. Kitchens,* 223 Ark. 442, 266 SW2d 281, 46 ALR 2d 1175. I think that it was shown by a clear preponderance of the evidence that the owners of the McIlroy lands should be presumed to have known that a passageway on the Mulberry River was being used by the public adversely to them and under a claim of right.

Since I cannot agree to the taking and appropriating by judicial fiat of vested property rights of riparian owners on streams which are nonnavigable under the test applied in Arkansas for a century, I must dissent from the majority opinion, but I would reverse the decree on the ground that a prescriptive easement has been acquired by adverse use.

APPENDIX "B"

DECREE OF FRANKLIN COUNTY CHANCERY COURT

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY and JAMES DUNLAVEY as
Executor of the Estate of GRADY R. McILROY,
as Tenants in Common ..... *Plaintiffs*

vs. Case No. E-78-76

OZARK SOCIETY and WAYFARER
EXPIDITIONS, INC. ..... *Defendant*

and

THE STATE OF ARKANSAS ..... *Intervenor and Defendant*

DECLARATORY JUDGMENT AND
RESTRAINING ORDER

Now on this 16th day of May, 1979, the above cause comes on for hearing, and from a review of the pleadings, the testimony of the parties and their witnesses, the statements of counsel, and from a complete review of the file and all exhibits, the Court doth find:

I

The Plaintiff, W. L. McIlroy, is a citizen and resident of the Ozark District of Franklin County, Arkansas, and owns property as tenants in common with the estate of Grady R. McIlroy, his deceased brother. James Dunlavey is the lawful and acting executor of the estate of Grady R.

McIlroy, having been appointed by order of the Probate Court of Franklin County, Ozark District, Docket No. P-77-13. W. L. McIlroy and the estate of Grady R. McIlroy own as tenants in common the following described property, to-wit:

TRACT NO. 1: The North Half of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 80 acres; The Southeast Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 40 acres; The East Fourth of the Southwest Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 10 acres; The Northwest Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; The Southwest Quarter of the Northwest Quarter of Section 17, Township 12 North, Range 26 West, 40 acres; Part of the Southwest Quarter of the Southwest Quarter of Section 22, Township 12 North, Range 26 West, 10 acres; Part of the Southeast Quarter of the Southeast Quarter of Section 21, Township 12 North, Range 26 West, 10 acres, containing in all 230 acres, more or less.

TRACT NO. 2: Part of the South Half of the Southwest Quarter of Section 24, AND Part of the Northwest Quarter of Section 25, in Township 12 North, Range 27 West, more particularly described as beginning at the Southwest Corner of said Section 24, running thence South 7.4 chains to a dry branch, thence with the meanderings of said branch to the South side of the Northwest Quarter of the Northwest Quarter of said Section, thence East to the Southeast Corner of said Northwest Quarter of the Northwest Quarter, thence East 15.06 chains, thence North 31½ degrees West 29.94

chains, thence North 19.43 chains, thence South 5.52 chains to the place of beginning. ALSO 2.66 acres in the Northeast Corner of the Southwest Quarter of the Northwest Quarter of said Section 25, hereby conveying 62 & 2/10 acres, more or less. Tract No. 2 conveys all that part of what was formerly known as the A. H. Sadler farm which was owned by the heirs of Miles Childers.

II

The Defendant, Ozark Society, is a non-profit corporation by virtue of its Articles of Incorporation filed with the Secretary of State of Arkansas on December 2, 1974. The Defendant, Wayfarer Expeditions, Inc., is a Missouri corporation authorized to do business in the State of Arkansas. The State of Arkansas has intervened in this cause on behalf of the general public, and specifically on behalf of the Arkansas Game and Fish Commission and the Arkansas Department of Parks and Tourism and has filed a counterclaim against the Plaintiffs. The Plaintiffs, in turn, have amended their pleadings to include the State of Arkansas as a party defendant. The Court has subject matter jurisdiction of this cause and personal jurisdiction over the Defendants, Ozark Society, Wayfarer Expeditions, Inc., and the State of Arkansas.

III

The Court makes the following findings of fact and law, to-wit:

(1) The Mulberry is not now and has not been a navigable stream as such at any relevant time in the past.

(2) The Federal Acts of Admission of Arkansas to the

Union do not contain public reservation of rights to non-navigable waters.

(3) The present state of the law as we understand it in Arkansas is the bed of a non-navigable stream is owned by adjoining owners to the center of the stream. In this case, Mr. McIlroy owned land on both sides of the stream through which the stream runs.

(4) The rights to enjoin the trespass, I am holding that Mr. McIlroy does have the right for the following reasons:

1. No public rights under the reserved title on rights in the public as described in Paragraph 2.

2. There is no prescriptive easement obtained by the canoeing which amounted to be what we would call occasional trespass. Any right to canoe or use of the stream by individuals or the public was asserted or brought home to the landowner within the period of limitations.

(5) Plaintiff's petition to enjoin the Defendant's publication of "The Mighty Mulberry" is hereby denied.

IV

The Ozark Society, Wayfarer's, Inc., and all persons having notice of this decree, their officers, agents, servants and employees, and licensees, are hereby enjoined from trespassing on that part of the Mulberry running through Mr. McIlroy's property as recited. The matter of publication of the order to be by posting, notices, posting of copies of decree, newspaper publication, radio, etc.

V

Costs are adjudged against the Defendant.

VI

The Court retains jurisdiction of the parties and the subject matter for all purposes, specifically including the enforcement of this decree.

IT IS SO ORDERED.

/s/ Richard Mobley,
Chancery Judge

APPROVED AS TO FORM:

/s/ Ronald W. Metcalf
Attorney for Plaintiff

/s/ Paul Means
Attorney for the State of Arkansas

/s/ Bay Fitzhugh
Attorney for Ozark Society

/s/ Jay Penix
Attorney for Wayfarer Expeditions, Inc.

Filed for record this 12th day of June, 1979.

Chancery Book "S", page 1.

/s/ Janice Morris,
Chancery Clerk

APPENDIX "C"

PETITIONERS' PETITION FOR REHEARING

IN THE SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS, ET AL ..... *Appellants*

vs. No. 79-320

W. L. McILROY, ET AL ..... *Appellees*

PETITION AN MEMORANDUM STATEMENT
REQUESTING REHEARING

The Appellees pursuant to Rule 20 of the Supreme Court are constrained to petition this Court for rehearing and to point out some of the deleterious effects of the Court's opinion delivered March 17, 1980. Without substantial discussion or reasoning, this Court has ignored and tacitly reversed over 150 years of well-developed case law concerning navigability of streams in this State. Many of the adverse effects of this decision were pointed out in the dissenting opinion of Chief Justice John A. Fogleman. Appellees would ask the Court to consider the following ramifications as a basis for reversal.

1. Judge Fogleman's dissenting opinion as it relates to the issue of navigability is incorporated herein by reference. The decision, as the dissent points out, clearly takes property (riparian rights) without due process of law and without any compensation, contrary to the United States and Arkansas Constitutions. By judicial fiat, this Court has determined that the new test of navigability is whether a stream is susceptible to a recreational use at some time of the year. There is

presently no such thing as a non-navigable stream in this State. Any insignificant freshet is now a navigable stream. The Court has performed what the Arkansas Legislature for many sessions has refused to do, and what they continued to refuse to do when they enacted Arkansas Natural and Scenic Rivers System, Act No. 257 of 1979.

2. The decision forever forecloses any cause of action in favor of the riparian owner of any stream for pollution since under the decision the State of Arkansas is the owner, and the only remedy would, therefore, be in favor of the State. *See, e.g., McLaughlin v. City of Hope,* 107 Ark. 443 (1913).

3. The decision prevents the riparian owner from ever diverting the waters of a stream or creek, either to create a body of water by damming, or to use the waters for irrigation, since the ownership of the stream or creek is now vested in the State and not in the riparian owner. By virtue of this Court's new and liberal definition of navigability, there remains virtually no stream in Arkansas which is non-navigable. The decision therefore directly controverts Ark. Stat. Ann. Sec. 35-501, *et seq.,* allowing damming of non-navigable streams.

4. The decision divests the riparian owner of any minerals or mineral rights beneath the streambed, and prevents the sale by the riparian owner of gravel or sand from the bed of the stream, because title is now vested in the State.

5. The decision emaculates riparian owners of any control or dominion over thousands of small nonnaviga-

ble streams in this State. Picnicing, boating, swimming, fishing and other activities upon these creeks might be engaged in by any who chose to do so at any time of the day or night. Additionally, McIlroy will not be able to fence the stream during the summer to prevent his cattle from escaping.

It cannot be over-emphasized that the Supreme Court in this instance has chosen to sit not as the judicial arm of the State, but as the legislative. The legislature has steadfastly refused to create a new rule of property which would provide a public easement for recreational purposes. The Appellees' property is being commercialized and used as a State park by Appellants and the general public for their own pecuniary gain. To change the definition of navigability at this late date is a cruel hoax to the thousands of rural property owners in this State who have purchased property through U. S. Government patents to the center of the stream and paid property taxes on their property with no possible idea that the State would later appropriate their property for public use.

HARDIN, JESSON & DAWSON
P.O. Drawer 968
Fort Smith, Arkansas 72902

By: RONALD W. METCALF

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, RONALD W. METCALF, do hereby certify that a copy of the enclosed Petition was mailed to Thomas A. Martin, Jr., Bay Fitzhugh, James H. Penix, Jr., P.A., Paul Means, Howard Cockrill and Jack T. Lassiter on April 1, 1980, at the addresses listed on the pleadings previously filed with this Court.

/s/ Ronald W. Metcalf

APPENDIX "D"

COPY OF DOCKET SHEET FROM OFFICE OF CLERK, ARKANSAS SUPREME COURT, REFLECTING DENIAL OF PETITION FOR REHEARING APRIL 21, 1980

79-320

Filed Sept. 13, 1979

ee certified to
preme Court
ov. 14, 1979. (CA 77-222)

andate to Clerk
4-21-80

11-7-79. Def. Appee Brief served
11-8-79. Def. Appellee Security Served
11-15-79 Def. State of Ark. Brief
11-30-79. Amicus Brf. Served (Ark. Canoe Club)
12-13-79 Brf. Appellee Served
12-14-79 Brf. Farm Bureau Served
12-28-79 Reply Brf. Served (Ozark Society)
12-28-79 Reply Brf. Served (State of Arkansas)
3-10-80 Submitted on Motion to file amicus curiae brief.
3-12-80. Reply to Response to motion to file amicus brief
3-17-80 Refused. Hickman J.
3-17-80 Motion to file amicus curiae brief denied.
4-1-80 Pet for Rehearing Served Appellee.
4-7-80 Response to rehearing Served
4-14-80 Submitted on Pet. for Rehearing.
4-21-80. Rehearing denied.

10-9-79. Appell
11-13-79 Printin
10-10-79. Appell
duplica
10-10-79. Motion
10-26-79. Mot
Sum
11-13-79. Print
11-16-79. Motion
case
11-26-79 above
11-29-79. Mot
12-3-79. Mot
12-20-79. Appell
addit
12-19-79. Appell
dismi
12-26-79. Noted.
12-26-79 Resp
for Oral Arg
12-28-79. Mot
Curiae brief
12-31-79. Submitted
1-7-80. Response
Newton C
1-7-80. Motion for a
1-7-80. Motion of Nat
2-19-80 Submi
3-3-80 Motion
amicus brief
3-4-80. Response
brief.

Supreme Court, U. S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McILROY AND JAMES DUNLAVEY, AS EXECUTOR OF THE ESTATE OF GRADY R. McILROY ..... *Petitioners*

VS.

STATE OF ARKANSAS, OZARK SOCIETY, AND WAYFARER EXPEDITIONS, INC. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

STEVE CLARK
Attorney General

Attorney General's Office
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent State of Arkansas

REQ. NO. 79-23917 50 COPIES

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McIlroy and James Dunlavey, as
Executor of the Estate of
Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and
Wayfarer Expeditions, Inc. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Respondent, State of Arkansas, respectfully requests that the petition for certiorari filed herein by Petitioners be denied.

QUESTION PRESENTED

Whether the question of a violation of the Fifth Amendment to the United States Constitution, which protects against the taking of property without due process of law and compensation, was properly raised and decided in the State Courts, therefore, vesting this Court with jurisdiction?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The Mulberry River, located in northwest Arkansas, originates in the Boston Mountains north of Ozark, Arkansas, and flows westerly a distance of 70 miles to a point where it joins the Arkansas River near Mulberry, Arkansas. It can best be described as an intermediate stream, smaller than the Arkansas River and other deep, wide streams that have been used commercially since their discovery, but neither is it like the many small creeks and branches in Arkansas that cannot be regularly floated with canoes or flatbottomed boats for any substantial period of time during the year. The Mulberry is somewhere in between; a typical rock-bottomed Ozark stream with relatively clear water and populated by a variety of fish. The Mulberry has been used by the public for recreational purposes for many years. It has long been used for fishing and swimming and has more recently become popular with canoeists.

In 1967, Petitioners acquired certain property through which a segment of the Mulberry River flows. Petitioners claimed that the river was nonnavigable and sought to prevent members of the public from crossing their property on the river. Respondents and members of the public claimed that the river was navigable and that they had a right to cross Petitioners' property on the river. The dispute continued for several years and culminated with Petitioners filing for a declaratory judgment on June 15, 1978, in Franklin County Chancery Court, against the Ozark Society and Wayfarer Expeditions, Inc. The Petition for Declaratory Judgment prayed that the court declare the Mulberry River to be nonnavigable at the point where it crosses Petitioners' property and that the public be enjoined from using the river through Petitioners' property. The

Ozark Society is a private non-profit conservation organization and Wayfarer Expeditions, Inc. is in the business of renting canoes. The State of Arkansas intervened on the grounds that a declaration of nonnavigability could divest the State of title to the streambed and the right of the public to the use of the waters could be foreclosed. Respondents filed answers and counterclaims alleging that the Mulberry River is navigable, and irrespective of navigability, the public had acquired a prescriptive easement over the watercourse.

The Chancery Judge held that the Mulberry River is a nonnavigable stream and that the public had not acquired a prescriptive easement. Respondents appealed to the Arkansas Supreme Court, alleging that the chancellor had erred in determining that the Mulberry River was nonnavigable and in failing to find a prescriptive easement. The Arkansas Supreme Court found that the Mulberry River can be used for recreational purposes for a substantial portion of the year, and consequently, is navigable. Petitioners filed a Petition for Writ of Certiorari seeking review of this action.

REASONS FOR DENYING THE WRIT

Petitioners have sought to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), which provides in part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . where any title, right, privilege, or immunity is specially set-up or claimed under the Constitution . . .

This invocation of jurisdiction is based upon the premise that the decision of the Arkansas Supreme Court has effected the taking of Petitioners' property without compensation, contrary to the Fourteenth Amendment to the United States Constitution. This amendment guarantees the right to equal protection and due process of law. Petitioners do not specifically explain what rights under the Fourteenth Amendment have been violated, however, due to the nature of the claim of taking without compensation, one may logically infer that Petitioners are seeking to apply the Fifth Amendment to the State through the Fourteenth Amendment. For purposes of this argument, it will be presumed that this is the federal question raised by Petitioners.

It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the State court below. *Crowell v. Randall,* 10 Pet. 368 (1836); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Petitioners did not plead or raise the issue of taking without compensation at the trial level. A question not put in issue by the pleadings, and not passed on by the

trial court, will not be determined on appeal. *Desha Bank & Trust Co. v. Quilling,* 118 Ark. 114, 176 SW 132 (1915); *Stroud v. Crow,* 209 Ark. 820, 192 SW2d 548 (1946). Petitioners did not properly place the federal question before the State courts, nor was it decided by the State courts, and thus this Court is not vested with jurisdiction. A state procedural rule which forbids the raising of federal questions at a late stage in the case, or by any other prescribed method has been recognized as a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375 (1955); *Hulbert v. Chicago,* 202 U.S. 275 (1906). These decisions preclude additional federal questions in regard to state procedure.

The one exception to this line of decisions is that in the extraordinary circumstance of an unexpected decision, a petition for rehearing may constitute the first time to present a federal question to the court. For Supreme Court jurisdiction to attach in this situation, the litigant must affirmatively demonstrate that the decision was a surprise and could not be anticipated. *Herndon v. Georgia,* 295 U.S. 441 (1935). In the absence of surprise, raising the federal question for the first time in a petition for rehearing is generally insufficient unless the court actually entertains and expressly decides the question. *Hanson v. Denckla,* 357 U.S. 235 (1958). Petitioners raised the federal question for the first time for the record in a petition for rehearing, which was summarily denied by the Arkansas Supreme Court, and therefore, the question was neither entertained nor expressly decided. Thus Petitioners have the burden of showing surprise and that the decision was unanticipated. In an attempt to meet this burden, Petitioners have blatantly misrepresented the record and local law.

At page six of Petitioners' petition filed with this

Court, in the second paragraph as part of the statement of the case, Petitioners state:

> "All parties conceded in the chancery court and in the Arkansas Supreme Court that the test under Arkansas law has always been whether the stream is capable for use commercially . . ."

The record is absolutely devoid of any such stipulation by parties, and in fact Respondents raised recreational use as establishing navigability at both the trial and appellate level. Petitioners have been aware of this argument since the trial level and cannot claim the issue was a surprise.

Petitioners have also attempted to characterize the decision as novel and discordant with prior Arkansas law, and thus unanticipated. Such is not the case. Upon admission to the Union, the State took title to the bed of navigable streams, and the determination of title and rights in navigable streams is a matter of local law. *Donnelly v. United States,* 228 U.S. 243 (1913). Under Arkansas law, the riparian owner holds title to the bed of a nonnavigable stream, while the State holds title to the bed of navigable streams for the use and benefit of the public. *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930). The instant case is similar to a title dispute in that the declaration of navigability or nonnavigability would determine title to the streambed.

The Arkansas Supreme Court has held that the running of a meander line along the bank of a stream does not establish navigability, although a body of water which has been meandered is prima facie navigable, but it is not necessarily or conclusively so. *Lutesville Sand & Gravel Co. v. McLaughlin, supra.* The record reflects that the Mulberry

River was meandered where it crosses Petitioners' property, which creates the rebuttable presumption that it is navigable. The final judicial determination, however, must be based on a finding of navigability in fact as navigability is defined in Arkansas law.

Petitioners have relied on the case of *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378 (1915), as defining navigability in terms of usefulness of the body of water for carrying commerce. Petitioners failed to cite all of the relevant provisions of this case. The Arkansas Supreme Court went on to expand the definition of navigability to include other public uses, including recreational boating, swimming, and fishing. The court in the instant case merely applied the existing definition of navigability to the Mulberry River. The establishment of navigability through recreational use is not unique, and a number of jurisdictions have reached similar decisions. *Attorney General v. Woods,* 108 Mass. 436 (1870); *State, ex rel. v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 73 Ohio Ops. 2d 124 (1975); *Kelley, ex rel. MacMullan v. Hallden*, 51 Mich. App. 176, 214 NW2d 856 (1974); *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State*, 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936); *Branch v. Oconoto County*, 13 Wis. 2d 595, 109 NW 2d 105 (1961); *Curry v. Hill*, 460 P.2d 933 (Okla. 1969); *State v. Twiford*, 136 N.C. 603, 48 SE 586 (1904).

The record reflects that Petitioners acquired title to the property in question in 1967, which was subsequent to the decisions in *Lutesville Sand & Gravel Co. v. McLaughlin, supra* and *Barboro v. Boyle*, supra. The property was acquired under a rebuttable presumption that the Mulberry River was navigable, and it is indeed navigable under

Arkansas law existing at the time of acquisition. Petitioners cannot claim that the decision was unanticipated or that the law was changed subsequent to their acquisition of the property. Under Arkansas law, Petitioners did not acquire title to the streambed with acquisition of the riparian land, and consequently, nothing was taken. There exists no federal question in the instant case.

Petitioners have failed to demonstrate the required elements to obtain jurisdiction by this Court. The federal question was not properly placed before the State court under state procedure, nor was decided by the State court. The State court decision was not a surprise and could reasonably be anticipated, and therefore no extraordinary circumstances exist. Most importantly, no federal question exists. In the absence of a proper federal question, this Court is without jurisdiction. Petitioners have sought to create the illusion of a federal question in hopes of inducing this Court to review local law, and perhaps interpret it in favor of Petitioners.

CONCLUSION

For all of the foregoing reasons and authorities, the State of Arkansas respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 27 1980
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NO. 79-2063

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

W. L. McIlroy and James Dunlavey, As Executor of The Estate of Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT, OZARK SOCIETY, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether or not the alleged federal question was properly raised in the State court proceedings.
2. Whether or not in our federal system the federal government may determine for each state which of its waters are to be deemed public (navigable) and which of its waters are to be deemed private (nonnavigable).
3. Whether or not the United States Supreme Court ought to become involved in the interpretation and/or development of common law by a particular state's highest tribunal when there is clear and settled precedent supporting a particular ruling among the several states.

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vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT, OZARK SOCIETY, BRIEF IN OPPOSITION

The respondent Ozark Society respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Arkansas Supreme Court. The opinion is reported at 268 Ark. 227, 595 SW2d 659.

STATEMENT OF THE CASE

The proceeding in the Arkansas Court ultimately involved a delineation of public and private rights in and to a segment of the Mulberry River, a scenic and popular

canoeing stream in northwest Arkansas. Petitioners own property through which the Mulberry River flows, and on June 15, 1978 filed a Petition for Declaratory Judgment in the Franklin County Chancery Court requesting that the court declare the Mulberry nonnavigable at the point where it transects petitioners' property and that the public be prohibited from boating through petitioners' property.

Defendants set forth in petitioners' petition were the Ozark Society, Wayfarer Expeditions, Inc., and The Wilderness Company. The Ozark Society is a nonprofit regional conservation organization. As part of its educational program the Ozark Society published in 1974 a canoeing guide to the Mulberry River, titled "The Mighty Mulberry," and petitioners claimed that publication and dissemination of the canoeing guide had caused trespass on and through their property.

Defendant Wayfarer Expeditions, Inc., is a private corporation engaged in the rental of canoes and other float equipment. The Defendant Wilderness Company did not file a response.

The State of Arkansas through the office of the Attorney General intervened on the grounds that a declaration of nonnavigability would divest the state of title to the stream bed and the right of the public to the use of the waters of the stream could be foreclosed.

The Defendants, Ozark Society, Wayfarer Expeditions, Inc., and the Intervener, State of Arkansas, filed answers and counterclaims alleging that the Mulberry River is a navigable water; that irrespective of whether the state or petitioners held title to the stream bed the public had a usufructuary right to use the waters of the stream; that by

virtue of conditions incorporated in the Act of Congress admitting Arkansas to the Union, the public has the right to use the Mulberry River as a highway; and that the public had acquired a prescriptive easement over the watercourse. In addition, the court was requested to enjoin petitioners from interfering with the lawful use of the stream by the public.

Since the turn of the century the waters of the Mulberry River have been used by individuals for swimming, fishing and boating. Commencing in the 1960's, floating the Mulberry River in canoes became increasingly popular, due to its reputation as one of the finest white water float streams in Arkansas. In 1971, W. L. McIlroy, who owns an undivided one-half interest in the tract in question, returned to Arkansas and became involved in farming operations conducted on the tract owned by petitioners, and between 1971 and the date of the filing of the Petition for Declaratory Judgment numerous confrontations occurred between Mr. McIlroy and canoeists, with Mr. McIlroy claiming that the stream was nonnavigable and private, and canoeists claiming that it was navigable and public.

The pertinent facts as they relate to development of title to the property in question are as follows:

The State of Arkansas was admitted to the Union in 1836 and the land in question was carved out of the Missouri Territory. In 1836, a set forth within the abstract on the property (Defendant Ozark Society Exhibit 1, Sheet 1 a), United States Government surveyors surveyed the property in question and the Mulberry River was set forth as meandered. The initial patent on the property in question was dated November 15, 1854 (Defendant Ozark Society

Exhibit 1, Sheet 6) and subsequent to that date petitioners acquired title to the property. Until the conclusion of this lawsuit there has never been a determination made by any court or the Arkansas legislature as to whether or not the waters of the Mulberry River are navigable or nonnavigable. There are numerous Arkansas Supreme Court decisions and Arkansas legislative pronouncements that relate to the navigability or nonnavigability of other watercourses.

The trial court concluded that the Mulberry River is not a navigable stream; that the federal Act of Admission of Arkansas to the Union did not obtain the reservation of rights to nonnavigable waters; that by virtue of the Mulberry River being deemed a nonnavigable stream petitioners own the stream bed where the waters flow through their property; and that petitioners have the right to prevent trespass thereon in that the Statute of Limitations had not run with regard to the acquisition of a prescriptive easement of the public.

The respondents *did not,* as stated in petitioners' Statement of the Case, concede at either the trial or appellate level that "the test for navigability under Arkansas law had always been whether the stream is capable of use commercially." (Pet. P. 6) See Appendix "A" hereto.

The State of Arkansas, the Ozark Society and Wayfarer Expeditions, Inc., appealed on the grounds that the Chancellor erred in determining the Mulberry River to be nonnavigable and/or in failing to find the existence of a public or prescriptive easement.

The Arkansas Supreme Court determined that the Mulberry River was navigable and reversed the trial court's decree in that regard and did not discuss or consider any of the other issues raised on appeal.

JURISDICTION

The Supreme Court lacks jurisdiction to review this cause, as the constitutional right claimed by the petitioners was not appropriately set up or claimed as required by 28 U.S.C. §1257(3). None of the pleadings of the petitioners, including the Petition for Declaratory Judgment and the Replies to Counterclaims filed by the respondents herein, set up or claimed a federal constitutional right to the stream bed and/or waterway which would have put into issue the federal due process question (R. 1, 40, 67 and 81). See Appendix "B". It is well settled in Arkansas that a reviewing court will not reach a constitutional issue raised for the first time on appeal. *Gross v. Gross,* 585 SW2d 14; *Williams v. Edmondson,* 520 SW2d 260. The majority opinion of the Arkansas Supreme Court in reliance on this rule did not consider the federal constitutional due process claim. The only time the federal constitutional question was raised was within the Petition for Rehearing, and under Arkansas practice it could not be considered. *Arkansas State Highway Commission v. Coffelt,* 522 SW2d 839; *Burks Motor, Inc. v. International Harvester, et al,* 466 SW2d 943. It cannot be heard by this Court as well. *Herndon v. Georgia,* 295 U.S. 441, 443.

Briefs before the State courts are not ordinarily part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Comm.,* 269 U.S. 354, 357-358. Even if the Supreme Court were to consider the brief of petitioners as evidence of a claim of a federal right under the United States Constitution, the only reference in petitioners' brief before the Arkansas Court to any constitutional right is a

reference on page 34 of petitioners' brief, to the Arkansas Constitution and "it is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the State, Constitution, was relied upon, and that such provision must be set forth." *New York Central and H. R. Co. v. New York,* 186 U.S. 269, 273.

Although the constitutional issue was raised in the dissenting opinion, it was done so contrary to customary Arkansas practice and the recognition of it in this instance cannot belie the fact that it was simply not properly raised by the petitioners. The Court should defer to the judgment of six of the seven justices of the Arkansas Supreme Court on this state procedural question. It should be assumed that the silence is due to a procedural deficiency, *Bailey v. Anderson,* 326 U.S. 203, 206-207, and this Court is bound by it. *John v. Paullin,* 231 U.S. 583, 585.

The question is one of jurisdiction, and in our federal system the question must have been raised and decided in the state court. *Crowell v. Randell,* 10 Pet. 368, 391; *Cardinale v. Louisiana,* 394 U.S. 437, 438. A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of the police power. *Williams v. Georgia,* 349 U.S. 375, 382-383.

Nor can the petitioners claim surprise in regard to the federal question since petitioners alleged in their Petition for Declaratory Judgment that as owners of the land bordering the Mulberry, a nonnavigable stream, they owned the bed of the stream as well as the water. (R. 4). See Appendix "B". Even if one assumes that all of the pertinent past decisions in Arkansas would call for a non-

navigability determination (which was disputed by respondents at both the trial and appellate level within the briefs and during oral argument), petitioners should have anticipated that there was a distinct possibility that the Arkansas Court would follow the precedent set in other state courts and extend the definition of navigability for state purposes to include recreational streams. The lawsuit as framed by the petitioners put squarely into issue the navigability viz a viz nonnavigability question and any legal consequences allegedly incidental to such a determination would have to be raised at the initiation of the lawsuit and not at this late date.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Court lacks jurisdiction to hear this cause. Note the preceding JURISDICTIONAL section.*

2. *The decision is based on an adequate and independent state ground.*

a. The Arkansas Supreme Court applied existing precedent to the question of whether or not recreational use can in and of itself support a navigability determination.

In applying case law to a dispute it should be axiomatic that any appellate court reviewing prior decisions would consider the precise issue that the court was ruling on and distinguish cases from one another based on rules or principles as they relate to a specific issue. It is conceded that there are a number of Arkansas cases which have required historical or prospective commercial use in order to qualify a stream for a navigability determination. However, apart from *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915), cases cited by the petitioners have not focused on whether or not recreational use of a stream can in and of itself be sufficient to support a finding of navigability. The cases generally deal with who owns the gravel or minerals beneath the stream bed or the extent of ownership of the stream bed or bank by a riparian landowner. *Barboro,* supra, standing alone could have supported a finding of navigability irrespective of other decisions of the Arkansas Court. The case has never been overruled although it has been misinterpreted in *McGahhey v. McCollum, Adm.*, 207 Ark. 180, 179 SW2d 661 (1944), wherein it is stated that the basis for the *Barboro* decision was the susceptibility of Horseshoe Lake to commercial use.

In *Barboro,* the Court indicated that whether or not a

stream can ever be used for the purpose of navigation in a successful venture is not an *exclusive* test of the navigability of the lake. (Emphasis supplied). Although in *Barboro* the Court noted that the testimony did indicate that Horseshoe Lake is susceptible of commercial use, the Court went on to state:

> It is the policy of this state to encourage the use of its watercourses for any useful or beneficial purpose. There may be *other* public uses than the carrying on of commerce of pecuniary value. (Emphasis supplied).

In citing the landmark case of *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893), and quoting from this case "to hand over all these lakes to private ownership, under *any old or narrow test of navigability,* would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated," (emphasis supplied) the Arkansas Court took the initial step in defining navigability to include recreational use only.

Barboro was decided in 1915 and petitioners acquired the property in question in 1967. Any expectation that the law in Arkansas was well settled as to whether or not recreational use of a watercourse could in and of itself support a declaration of navigability is simply refuted by the *Barboro* decision. In addition, the fact that the river was meandered within the government survey would put a prospective purchaser on notice that the watercourse could be considered navigable.

The statement in the majority opinion that it may be that past decisions in Arkansas did or did not anticipate recreational use as a basis for navigability indicates that

the six justices may not have agreed among themselves on this question; however, four justices could have cited *Barboro* as precedent for the holding in the instant case without including language to the effect that the definition of navigability in Arkansas was being redefined.

b. Within Item 2 of Questions Presented, petitioners assume that the title to the stream bed was vested in the riparian. Whether or not the property right claimed by petitioners was vested is properly a question of local law and the United States Supreme Court should defer to the judgment of the Arkansas Court since there is clearly a basis for holding that it was not a vested right.

It is axiomatic that one cannot take what has not been granted. Until the Arkansas Court or the Arkansas legislature has made a specific determination as to whether or not the Mulberry River is or is not navigable, there is no basis for elevating the right claimed by petitioners to a constitutionally protected vested right.

As stated in 16 C.J.S., Constitution Law, Section 215, a vested right "must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property fouded on *anticipated continuance of existing laws* does not constitute a vested right." (Emphasis supplied).

Had the Arkansas Supreme Court determined that the Mulberry River was a navigable river, this decision would have been tantamount to confirming title to the river in the landowner and at this point the allegedly divested right would have become vested. Had this occurred and had the Arkansas legislature subsequent thereto declared the Mulberry River to be a navigable river, petitioners

would have a basis upon which to claim they possessed a vested right entitled to constitutional protection.

c. Arkansas has adopted the English common law by means of a reception statute. Ark. Stat. Ann. §1-101. Throughout the development of common law, courts have on many occasions drawn on the "animating principles" of a particular rule of law and technically changed the law in order that it conform with the underlying basis for the rule of law. As noted in *Lamprey v. Metcalf*, supra, in England the division of waters into navigable and nonnavigable was but a way of dividing them into public waters and private waters since the principal public use of that time was navigation. The growth and vitality of the common law has been noted by this Court. "It has been said so often as to become axiomatic, that the common law is not immutable but, flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383.

The majority of justices could have construed *Barboro* as it was construed in the dissent but nevertheless held that the Mulberry River was navigable since it was clearly considered a public stream by almost everyone except the landowner. In essence what was de facto a pubic stream became de jure a public and not a private stream.

Each state should be given great leeway in developing its common law, particularly when the law in a particular area *i.e.*, water law, has been fashioned to such a large degree by judge-made law which historically has reflected a concern with constitutional restraints attendant to any decision. The question is not whether this Court would have ruled as the majority has but whether or not it is clear within the context of a difficult and important state

public policy determination a properly raised constitutional right has been violated.

3. *It is well settled that each state is free to define navigability thereby allocating public and private rights in watercourses within the state.*

Since *Hardin v. Jordan,* 140 U.S. 371, it has been clear that the states have the power to determine as a matter of local law the question of what waters are navigable. Uniformity is certainly desirable when setting limits within which a navigable servitude may be obtained by the federal government without compensation (note discussion within succeeding Section 4); however, under our federal system the navigability question at the state level ought not be constrained by the federal government. The issues are different, as a state is dealing with intrastate waters and determining not singularly whether they should be open to the public as a commercial transportation network, but whether or not the fee simple title to them ought or ought not be retained in the public domain and/or if it is to be granted what usufructuary rights should be retained in the public.

As the states are free to determine which waters are public and which are private, subject to federal use, regulation and control, so too the riparian patentee takes subject to the power of the state to construe the patent in the interest of its total citizenry. *Barney v. Koekuk,* 94 U.S. 324. For ownership and interest in water, particularly running water, is in no sense comparable to the ownership of a chattel or fast land.

The historical and philosophical basis for treating the

ownership of water differently from other elements was recognized by this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-745, wherein it is stated:

> As long ago as the Institutes of Justinian, running waters, like the air and the sea, were res communes — things common to all and property of none. Such was the doctrine spread by civil law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law.

4. *The principles contained within Kaiser Aetna v. United States —— U.S. ——, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) are not applicable to this case.*

It was assumed by this Court that Kuapa Pond was "fast land" under Hawaiian law. If it was "fast land" it would be deemed private and this Court stated that title to Kuapa Pond had actually vested in a particular person. Whether or not title to the Mulberry River had vested in petitioners is one basis for distinguishing the majority decision of the Arkansas Court from the dissent and it was properly a question of local law.

Had the Arkansas Court heretofore determined that the Mulberry River was a navigable river and subsequent thereto petitioners constructed a farm pond or lake on "fast land" with access to the Mulberry River, and a state agency ruled that the public had a legal right of access to the pond or lake, the taking question would have been in issue and *Kaiser Aetna* could serve as authority for a requirement of compensation.

5. *The United States Constitution does not protect an alleged common law right.*

A person has no property right or vested interest in any rule of common law as the Constitution does not forbid creation of new rights or abolition of old ones recognized by common law to attain permissible legislative objectives, despite the fact that otherwise settled expectations may be upset thereby. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88.

This Court expanded the definition of navigability beyond the English criteria of the ebb and flow of the tide in *The Daniel Ball*, 77 U.S. 557 and there was no suggestion that it was unconstitutional. Are not the states free to fashion their common law in the same manner to protect and preserve the public interest of a state's citizens in the water resources of a state?

6. *It is not clear within the decision whether or not title to the Mulberry River stream bed has been retained in the state.*

The majority decision did specifically find that the Mulberry River was navigable with all incidental rights of that determination and the vast majority of Arkansas cases have held that on navigable streams title to the stream bed remains in the state. However within *Barboro v. Boyle*, on page 381, is the following statement from an earlier Arkansas case:

> Nor is it any objection to the public easement for navigation, that riparian proprietors of land, along fresh waters, own to the thread of the stream.

Perhaps the law was felt to be clear on this and the majority of justices deemed the language as to "incidental rights" sufficient to cover this point. But in any event if clarification is called for it should be made by the Arkansas Court as there are public policy questions which argue for and against retention of the stream bed in the state. Some states retain title to the stream beds of navigable waters; others do not. This Court should defer to the judgment of the individual states.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

That part of respondent Ozark Society's brief discussing navigability as a Point to be Relied Upon and the Argument relating to this point.

POINT TO BE RELIED UPON

I

THE COURT ERRED IN DETERMINING THAT THE MULBERRY RIVER IS A NONNAVIGABLE STREAM.

ARGUMENT

I

THE COURT ERRED IN DETERMINING THAT THE MULBERRY RIVER IS A NONNAVIGABLE STREAM.

Recently, the United States Supreme Court stated:

> As long ago as the Institutes of Justinian, running waters, like the air and the sea, were res communes — things common to all and property of none. Such was the doctrine spread by civil law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law.

United States v. Gerlach Live Stock Co., 339 U.S. 725, 744-745, 94 L.Ed. 1231, 70 Sup. Ct. 955 (1950).

In determining the extent of public rights in water the courts have historically been called upon to define navigability as a test of the public interest in waters.

Federal courts have been called upon to define navigability essentially for three purposes:

1. To determine the extent of admiralty jurisdiction;
2. To determine navigability within the context of the commerce clause of the U. S. Constitution;
3. To determine the ownership of a submerged bed.

Since *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845), it has been clear that rights in tidelands and in lands under navigable waters within state boundaries are governed by state rather than federal law. And in this respect each state as a function of its sovereignty has developed its own definition of navigability for purposes of determining which waters are jus privatum as opposed to jus publicum. For an excellent analysis of "navigability," note 1 Waters and Water Rights, Chapter 3, (R. Clerk ed. 1967) generally and pages 212-217 specifically.

Sheet 1-A within the Abstract to the property of the Plaintiffs, Ozark Society Exhibit "1", indicates that the Mulberry River was meandered when the property was surveyed in 1838. The Arkansas Supreme Court in *Lutesville Sand and Gravel Company v. McLaughlin,* 181 Ark. 574, 580, 26 SW2d 892 (1930), in citing 45 C.J. Navigable Waters, Sec. 15, stated:

> The running of a meander line along the bank of a stream does not establish its navigability, although it has been held that a body of water which has been meandered is prima facie navigable, but is not necessarily or conclusively so.

The landmark Minnesota case which has been cited by numerous state courts, including the Arkansas court,

Lamprey v. Metcalf, 52 Minn. 181, 53 NW 1139, 1143 (1893), contains the following statement:

> The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters, — a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits. In early times, about the only use — except, perhaps, fishing, — to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and nonnavigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be

> capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used — and as population increases, and towns and cities are built up in their vicinity, will be still more used — by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.

In 1915, the Arkansas court in a decision relating to Horseshoe Lake in eastern Arkansas, cited *Lamprey v. Metcalf,* supra and in *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378, upheld the right of the public to the use of the waters. The *Barboro* decision enlarged on the classical definition of navigability in a commercial sense which had been heretofore enunciated in *Little Rock, M. R. and T. Ry. v. Brooks,* 39 Ark. 403 (1882) and indicated that whether or not the waters of a lake are adapted to the purpose of navigation in a successful financial venture is not an *exclusive test* of the navigability of the lake. (Emphasis supplied)

The public trust that is imposed upon the state in its sovereign capacity ultimately rests with this court and that public trust is set forth in the following language contained within *Barboro*. The court in *Barboro* stated:

> It is the policy of this state to encourage the use of its water courses for *any* useful or beneficial purpose. There may be other public uses than the carrying on of commerce of pecuniary value. The culture of rice is being developed in this state and the waters of the lake could be used for the purpose of flooding the rice fields and for other agricultural purposes. As the population of the state increases the banks of the lake may become more thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. Moreover, the waters of the lake might be used to a much greater extent — for boating, for pleasure, for bathing, fishing and hunting, than they are now used. (Emphasis supplied)

Admittedly, the only proof within this record as to navigability of a traditional commercial nature on the Mulberry River was the floating of logs on two occasions. (T. 302, 303) The traditional test of navigability was established at a time when the chief commercial value of waterways was in transporting produce to and from markets. The benefits to the public and immediate countryside in keeping major waterways open were obvious in those days.

The commercial value of the Mulberry River to the public and the immediate countryside are just as obvious

today. The Mulberry River and other major recreational streams in the Ozarks constitute one of the principal attractions for tourists and the economic well-being of many counties in north Arkansas is directly dependent on a flourishing tourist trade. (T. 425) Is not the use of the waters of the Mulberry in a way that fosters a one billion dollar a year industry in Arkansas (T. 425) both a useful and beneficial purpose that should be encouraged within both the letter and spirit of *Barboro*?

There is a clear duty on this court to protect the public interest in those waters of the state that constitute significant public water resources. This is not to say that every miniscule stream or small lake should be deemed a public water by this court. The true test, as enunciated in *Barboro*, should be the extent to which there is a substantial bona fide public interest, both present and prospective, with regard to the uses to which a body of water might be put.

The public nature of the Mulberry River based on the record of this case is manifest.

Thelma Smee, who was born in a house at the Low Water Bridge in 1905, testified as to extensive public use in the Davis Hole below the Low Water Bridge and up and down the river since the early 1900's. (T. 375) Curtis Childers, who had personally been on the Mulberry River a thousand times in his 66 years, testified as to common use of the Mulberry by his family and other families for generations without anyone having to get permission to use the river. (T. 417) Fasie Torix and his mother and father have picnicked on the Mulberry, camped on it and fished on it for the past 30 years. Mr. Torix would float maybe 10, maybe 15, 20, times a year and on none of the floats did he get permission from the landowners to float through

their property. He stated that he didn't feel that anybody owns the water — that they may own the land but they don't own the water. (T. 543) Jesse Jones, who owns property on the Mulberry east of Cass, testified that he didn't feel that he needs permission to float on the river. (T. 547) Gary Turner, whose father, Champ Turner, ran a canoe shuttle service through the late 1950's and into the 1960's, testified that he and his father had shuttled over 1,000 cars and that he did not feel that permission of landowners was needed to float through their property. (T. 575) Leslie Ellison, 45 years of age, testified that he had been fishing the Mulberry ever since he was big enought to fish. Up and down and in the vicinity of the Low Water Bridge. He fished without getting permission because he felt that he had the right to fish on the river. (T. 567) Don Rice, a carpenter from Altus, testified that he had floated and fished through the property in question three times a year since 1960 or 1961 and that he felt he did not need permission to do this. (T. 464)

The record indicates that the river became increasingly popular for canoeing and the President of the Ozark Society, James W. Wiggins, testified that the Ozark Society listed a scheduled float on the Mulberry River by a chapter of the Society every year from the summer of 1967 through the winter of 1977-78. (Note Exhibit "3" of Defendant Ozark Society as to the particulars.)

There was direct testimony as to the use of the river by individual canoeists, often with reference to notes or canoeing logs, and always with the understanding they were exercising a public right of floatage on the river:

Harry Crisson in April, 1965, with 15 to 20 people on the trip; April 1967, 1972 and 1973. (T. 385) Nancy Jack, 1964,

with about 20 people, and again in 1965 with about 19 people, and in 1967 with about 26 people. (T. 395) James Magness floated through the property in question in 1976, 1977 and 1978. (T. 442) Douglas Tims floated through the McIlroy property in April of 1972 and has floated about 30 times a year since then. (T. 494) Arthur Foy Evans first floated the Mulberry River through the McIlroy property in 1967 and has floated that section every year since then either once or twice except two years he was in the military service. (T. 498) Bob McCoy indicated that he had floated through the McIlroy property four or five times in the past eight years. (T. 510) Harold Hedges first floated through the McIlroy property in 1952 and again in 1964, 1965, 1967 and 1969. (T. 516) Leonard Heman initially floated the Mulberry in 1965 and again in 1967. On each float there were approximately ten to twenty people. (T. 526) Norman C. Preston first floated the Mulberry in 1964 with about 12 other people, and again in 1965 with 23 people. (T. 529) Roy Fuller first floated through the McIlroy property in 1967 and subsequently an additional nine times every following spring. (T. 533) Melvin Smith first floated through the McIlroy property in 1964; again in 1965 with 18 people; again in 1967 with a party of eight; in 1972; in 1973 with eleven other individuals; finally in 1975 with a group of perhaps 30. (T. 535) John Ewing, a local doctor, first floated through the McIlroy property in May of 1965 and an average of twice a year until five years ago when he moved to Ozark, and more frequently since then. (T. 539) Joseph Acuff started canoeing the Mulberry River in 1964 and his logs reveal a record of twelve trips spanning the years 1965 through 1976. (T. 569) David Thrasher first floated through the McIlroy property in 1970 and averaged two or three floats a year since then. (T. 597) Stewart

Noland first floated through the McIlroy property in the spring of 1971 and particularly every spring since then, with anywhere from two to a dozen people on each float. (T. 603)

Agencies of the state have recognized the intrinsic public nature of the Mulberry River and in reliance thereon have published literature in effect advertising the river to be a public water open to residents and non-residents alike. Richard Davis, Director of the Department of Parks & Tourism, testified that he considered the Mulberry River a public water. (T. 434) He indicated that the pamphlet, "The Float Streams of Arkansas," Intervenor State Exhibit No. "1", was published because of the increasing interest and the number of inquiries and demand the Department of Parks & Tourism had been receiving about fishing and floating. (T. 425) Mr. Davis pointed out that tourism was a billion dollar industry in Arkansas, the Number One industry in 16 north Arkansas counties, and that the two principal questions his Department received concerned water oriented recreation, *i.e.*, fishing and floating, in that order. (T. 426)

George Purvis, the Information Officer for the Arkansas Game and Fish Commission, testified in regard to the pamphlet, "The Float Streams of Arkansas," and stated that the Mulberry River was included since it was one of the streams in the state that was considered to have the most appeal to floaters and fishermen and was considered open to the public. Mr. Purvis classified the Mulberry as one of the top five or six recreational streams in the state. (T. 468) Mr. Purvis then identified Ozark Society Exhibit No. "6", *Arkansas Game and Fish Commission* Vol. 7, Issue 3, spring 1975, containing an article on and pictures of the

Mulberry River, within Pages 12 through 16. The large color photograph on Pages 12 and 13 was taken two and a half miles above the Low Water Bridge. (T. 519) Mr. Purvis also introduced another Game and Fish Commission publication, *Major Smallmouth Bass Streas of Arkansas*, Ozark Society Exhibit "7", which includes information on the Mulberry River.

William E. Keith, the Chief of Fisheries Division, State of Arkansas, pointed out as set forth within Defendant Ozark Society's Exhibit Number "8", Stockings of the Mulberry River 1952-77, that the Mulberry River had been stocked extensively commencing in 1952 and through 1977 and that in fact some of the stockings had taken place at the Low Water Bridge on the McIlroy property. (T. 486)

The stocking of fish was at public expense and in a sense these actions taken by the state without objection thereto by any party, including landowners along the Mulberry, were tantamount to an implicit dedication of these waters to public use.

In addition, Mr. Keith also referred to Defendant Ozark Society Exhibit No. "9", a stream survey which was conducted as part of an overall objective to locate, identify, describe and classify all the public waters within the state. (T. 488) Item 13 of the exhibit indicates that in 1952 the waters of the Mulberry River were being used for floating and commercial fishing; swimming, duck hunting and stock watering.

In addition to the official state recognition of the public nature of these waters, the U. S. Forest Service published a pamphlet, "The Mulberry River," Intervenor Exhibit No. "2", and within that pamphlet it is stated that the river's

scenic and recreational characteristics accented with its pristine waters has been appreciated locally and regionally from the period of early settlement.

Ed Harris, the District Ranger for the U. S. Forest Service, testified that he has seen people canoeing on the Mulberry at all times of the year, mostly March through May, and that in 1978 an estimated 160 canoes per weekend were being utilized on the Mulberry River. (T. 592)

Although there has been no formal declaration that waters of the Mulberry River are indeed public, it is clear from the record that there was a common understanding among all people and a custom and tradition that the waters of the Mulberry River were jus publicum. It is submitted that various state and federal pamphlets were published as a further manifestation of this, and that until Plaintiff, W. L. McIlroy, returned from California in 1971 (T. 258) no one seriously questioned the right of the public to use the waters of the Mulberry River.

As late as 1973 *Barboro v. Boyle,* supra, was cited in *Hays v. State,* 496 SW2d 372, 374, 254 Ark. 682, when this court reiterated that the financial success of a navigable venture was not an exclusive test of navigability.

In fact, in the landmark case dealing with the rights of riparian landowners to the use of adjacent waters, *Harris v. Brooks,* 283 SW2d 129, 134, 225 Ark. 445 (1955) the policy of the state enunciated in *Barboro* to encourage the use of its water courses for any useful or beneficial purposes was again cited in a footnote. Domestic use of water is superior to all other beneficial uses and by implication the use of water for fishing, swimming, recreation and irrigation are

on an equal basis and subject to the same protection as a use for navigation.

In 1942 *Barboro* was cited in *Anderson v. Reames*, 204 Ark. 216, 222, 161 SW2d 957, wherein the court quoted from a Wisconsin case, *Pewaukee v. Savoy*, 103 Wis. 271, 79 NW 436, 74 Am. St. Rep. 859, 50 L.R.A. 836, as follows:

> Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trustee is inviolate, the state being powerless to change the situation by any way abdicating its trust.

In 1915 this court in *Barboro* upheld for all time the right of this generation and future generations to use the waters of Horseshoe Lake, a recognized major recreational resource in eastern Arkansas. The terrain along the Mulberry River is not the same, the waters are dissimilar in certain ways; however, the susceptibility of the waters of the Mulberry to the public use cited in *Barboro* are not dissimilar. This court is the ultimate repository of the public trust that attaches to public waters and unless this court is willing to overrule the principles enunciated in *Barboro*, the court can only find that the waters of the Mulberry are indeed public and therefore navigable.

The position of the Appellant, Ozark Society, is that the law as it has been enunciated by this court compels a finding of navigability. However, it is instructive to consider how the States of Oklahoma and Missouri, which along with Arkansas are blessed with the magnificent

streams that lace the Ozark-Ouachita region, have ruled on the navigability question.

In 1954, in *Elder v. Delcour,* 269 SW2d 17, the Missouri court declared that the Merimac River, an Ozark stream, was open to the public for both travel and passage, by floating and wading, for business or for pleasure. In 1969, the Oklahoma court in *Currie v. Hill,* 460 P.2d 933, 935, found that the Kiamichi River, a Ouachita stream, is one of the beautiful streams of southeastern Oklahoma; that it has for many years been known as one of the best fishing streams in the state and used by the public for fishing, recreation and pleasure, and held that the river is an open stream, navigable in fact and can be fished on from boats if the fisherman gets on the stream without trespassing against the will of the abutting owner. A comparison of the Mulberry to the Kiamichi was made by Bob McCoy, a witness from Oklahoma, who testified that he was familiar with both the Mulberry River and the Kiamichi River and that the rivers were very similar in size but that the Mulberry River carries a much larger volume of water than the Kiamichi. (T. 510, 513)

APPENDIX "B"

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY and JAMES DUNLAVEY as
Executor of the ESTATE OF GRADY R. McILROY,
As Tenants In Common ..... *Plaintiffs*

v. CASE NO. E-78-76

OZARK SOCIETY, WAYFARER
EXPEDITIONS, INC. and
THE WILDERNESS CO. ..... *Defendants*

PETITION FOR DECLARATORY JUDGMENT

Come now the plaintiffs, W. L. McIlroy and the Estate of Grady R. McIlroy, and for their Petition for Declaratory Judgment herein against the defendants, state and allege:

I.

That W. L. McIlroy is a citizen and resident of the Ozark District of Franklin County, Arkansas, and owns property as tenants in common with the Estate of Grady R. McIlroy, his deceased brother which shall be fully described herein. James Dunlavey is the lawful and acting Executor of the Estate of Grady McIlroy, having been appointed by order of the Probate Court of Franklin County, Ozark District, Docket No. P-77-13.

II.

The Defendant, Ozark Society, is an unincorporated association of outdoor enthusiasts and canoeists who have published a pamphlet called "The Mighty Mulberry"

publicizing the Mulberry Creek or River near the Cass community of Franklin County, as public property and which has caused the property owned by the plaintiffs to be commercialized and invaded by trespassers. In addition, the association also publishes to its members, "The Quarterly Ozark Society Bulletin", edited by Joe and Maxine Clark. Dr. Neil Compton of Bentonville, Arkansas, is the President of the Ozark Society and as such is authorized to accept service of process herein. The defendant, Wayfarer's Expeditions, Inc. is a Missouri Corporation, not authorized to do business in the State of Arkansas, but which operates a canoe rental business on the Mulberry Creek or River and the persons to whom they rent their canoes are constantly trespassing on plaintiff's porperty. Their agent for service of process in the State of Missouri is Walter E. Thomas, 1346 East Loren, Springfield, Missouri, and they are subject to service of process by virtue of the Arkansas Long Arm Statute. The defendant, The Wilderness Co., is also engaged in the Canoe Rental Business on the Mulberry but plaintiff is unable to determine the exact nature of their business organization or their agent for service of process.

III.

The plaintiffs own the following described property in the Ozark District of Franklin County, Arkansas, to-wit:

TRACT NO. 1: The North Half of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 80 acres; The Southeast Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 40 acres; The East Fourth of the Southwest Quarter of the Northeast Quarter of Section 28, Township 12 North, Range 26 West, 10 acres; The Northwest

Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; The Southwest Quarter of the Northwest Quarter of Section 27, Township 12 North, Range 26 West, 40 acres; Part of the Southwest Quarter of the Southwest Quarter of Section 22, Township 12 North, Range 26 West, 10 acres; Part of the Southeast Quarter of the Southeast Quarter of Section 21, Township 12 North, Range 26 West, 10 acres, containing in all 230 acres, more or less.

TRACT NO. 2: Part of the South Half of the Southwest Quarter of Section 24, AND Part of the Northwest Quarter of Section 25, in Township 12 North, Range 27 West, more particularly described as beginning at the Southwest Corner of said Section 24, running thence South 7.4 chains to a dry branch, thence with the meanderings of said branch to the South side of the Northwest Quarter of the Northwest Quarter of said Section, thence East to the Southeast Corner of said Northwest Quarter of the Northwest Quarter, thence East 15.06 chains, thence North 31 1/2 degrees West 29.94 chains, thence North 19.43 chains, thence South 5.52 chains to the place of beginning. ALSO 2.66 acres in the Northeast Corner of the Southwest Quarter of the Northwest Quarter of said Section 25, hereby conveying 62 & 2/10 acres, more or less. Tract No. 2 conveys all that part of what was formerly known as the A. H. Sadler farm which was owned by the heirs of Miles Childers.

IV.

At certain times of the year, the Mulberry Creek or River will be at high water, and due to the efforts of the

Ozark Society, and Wayfarer Expeditions, Inc., the Mulberry has been widely publicized, principally by the publication and distribution of a pamphlet called "The Mighty Mulberry" by the Ozark Society, and the outdoor enthusiasts and canoeists travel considerable distances to reach the Mulberry. During the spring season it is not uncommon for at least six hundred people per weekend to pass over the McIlroy land. These people litter and their behavior is so offensive that Plaintiffs are denied the peaceful enjoyment of their property. Up until about the last three years, the Mulberry was not publicized, and there were very few people canoeing on the stream. Due to the joint efforts of the Ozark Society and Wayfarer Expeditions, Inc., the Mulberry has now been commercialized and publicized as public property and people from as far away as Texas, Kansas, Missouri, Louisiana and Michigan come to the Mulberry for purposes of floating and canoeing. For instance, attached hereto as Exhibit "A" is the front and back of a Wayfarer's Expeditions, Inc. map and pamphlet which states "The Mulberry River is a perfect setting for canoeing, hiking and back packing trips in the Ozark National Forest." It makes no mention of privately owned land, and a high percentage of the land on the Mulberry is privately owned. Further, the members of the Ozark Society, and the principals of the Wayfarer Expeditions, Inc. publically state that the Mulberry is a public property because it is a navigable stream and they have the absolute right to float the stream, without regard to the wishes of the landowners. The Plaintiffs on the other hand maintain that the stream is nonnavigable and that anyone floating the stream where they own property on both sides of the stream is trespassing.

V.

Most often, any canoeist who is stopped by Plaintiff or their agents will display a map furnished by either the Ozark Society or the Wayfarer's Expeditions, Inc. and argue vehemently that he or she is not on private property by virtue of the misleading map which had been provided by the Defendants. The Defendants and their agents, servants or members should be permanently restrained and enjoined from continuing to distribute any map, publication, or advertisement of any form which does not reflect or state, that with the exception of that part of the Mulberry which flows through the Ozark National Forest, is private property and anyone floating the stream outside of the boundary of the Ozark National Forest is trespassing.

VI.

The Plaintiff, W. L. McIlroy, has incurred substantial theft and burglary losses in excess of $17,000.00 Dollars over the past three years and approximately ten to twelve head of his cattle since 1971 have been stolen or shot. It is no longer possible for him to obtain burglary or theft insurance, and his previous coverage in this regard has been cancelled. The Plaintiff, W. L. McIlroy, has repeatedly requested that the Deputy Prosecuting Attorney of Franklin County, Arkansas, Gregory McKenzie, as well as the Sheriff of Franklin County, Bob Pritchard, proceed to issue trespass citations to any person who may trespass upon his property. The Sheriff and Deputy Prosecuting Attorney have advised Plaintiffs that until the issue of navigability of the Mulberry is determined by a competent court of jurisdiction, they will not prosecute anyone canoeing through their property.

VII.

At the point where the Mulberry crosses the McIlroy property, the stream is nonnavigable. The McIlroy's own property adjacent to the Mulberry, and at certain places they own both sides of the property adjacent to the Mulberry. As the owners of the land bordering the Mulberry, which is a nonnavigable stream, they own the bed of the stream as well as the water. The Defendants, and their agents contend that the Mulberry is navigable as it crosses the McIlroy property, and the ownership of the bed and the uses of the water are therefore vested in the public. Attached hereto as Exhibit "B" and "C" are copies of publications of the U. S. Corps of Engineers and Arkansas Game and Fish Commission describing what they consider as navigable streams in the State of Arkansas. The Corps of Engineers considers the Mulberry navigable up to the town of Mulberry, Arkansas, which is approximately twenty to twenty-five miles below from plaintiff's property. While this is not conclusive evidence, it is some evidence to be considered by the Court.

WHEREFORE, the Plaintiffs pray that this Court enter its declaratory judgment declaring that the Mulberry Creek or River is nonnavigable at points where it crosses the Plaintiffs' properties, and that this Court issue its permanent restraining order against the Defendants, the Ozark Society, and Wayfarer Expeditions, Inc., and the Wilderness Company, and their agents, employees or members from broadcasting radio and television advertisements and from publishing any booklets, maps or other publications which are misleading as to the ownership of the Mulberry, and which would fail to advise all parties that the Mulberry, with exception of a small portion in the

Ozark National Forest, is privately owned property and not open for public use, and further that the defendants, their agents and members be permanently restrained from floating or canoeing on the Mulberry where it crosses the Plaintiffs' property. Further, that the Deputy Prosecuting Attorney, and Sheriff be directed to assist the Plaintiffs in removing from their property trespassers, who may attempt to canoe across the Plaintiffs' property, and for all other relief to which the Plaintiffs may be required, whether specifically prayed or not.

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Fort Smith, Arkansas 72901

By: /s/ Ronald W. Metcalf

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY, AND JAMES DUNLAVEY,
As Executor of the Estate of
GRADY R. McILROY, deceased ..... *Plaintiffs*

vs. CASE NO. E-78-76

OZARK SOCIETY, WAYFARER
EXPEDITIONS, INC., THE WILDERNESS
COMPANY and THE STATE OF
ARKANSAS ..... *Defendants*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and

for their Reply to the Counterclaim of the State of Arkansas, state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREFORE, having fully answered, the Plaintiffs and Counter-Defendants pray that Counterclaim be dismissed, and to all other relief to which they are entitled, whether specifically prayed or not.

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EXPEDITIONS, INC., THE WILDERNESS
COMPANY and THE STATE OF
ARKANSAS ..... *Defendants*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and for their Reply to the Counterclaim of Ozark Society, state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREUPON, having fully answered, the Plaintiffs and Counter-Defendants pray that the Counterclaim be dis-

missed, and to all other relief to which they are entitled, whether specifically prayed or not.

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By: /s/ Ronald W. Metcalf

IN THE CHANCERY COURT OF
FRANKLIN COUNTY, ARKANSAS
OZARK DISTRICT

W. L. McILROY and JAMES DUNLAVEY as Executor of the ESTATE OF GRADY R. McILROY, as Tenants in Common ..... *Plaintiffs*

vs. Case No. E-78-76

OZARK SOCIETY, WAYFARER EXPEDITIONS, INC. and THE WILDERNESS COMPANY ..... *Defendants*

and

THE STATE OF ARKANSAS ..... *Intervenor*

REPLY TO COUNTERCLAIM

Come now the Plaintiffs and Counter-Defendants, and for their Reply to the Counterclaim of Wayfarer Expeditions, Inc., state and allege:

I.

They deny generally and specifically, the allegations of the counterclaim, but do admit that W. L. McIlroy has

continuously and persistently attempted to stop trespassers from crossing the property in question, without permission has been granted previously.

II.

The Plaintiffs and Counter-Defendants specifically deny that the public has acquired a prescriptive right-of-way easement across the property in question.

WHEREFORE, having fully answered, the Plaintiffs and Counter-Defendants pray that the Counterclaim be dismissed, and to all other relief to which they are entitled, whether specifically prayed or not.

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Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

NO. 79-2063

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

W. L. McIlroy and James Dunlavey, As Executor of The Estate of Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent Wayfarer Expeditions, Inc.

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

QUESTIONS PRESENTED

Wayfarer takes issue with the two questions presented by Petitioners. The first question, alleging that the Supreme Court of Arkansas erred in finding the Mulberry River to be a navigable watercourse appears to involve appeal on the merits of the case and presents an issue not arising under 28 U.S.C. §1257(3). For that reason, the only question actually presented to this Court is as follows: Was the question of a violation of the Fifth Amendment to the United States Constitution which protects against the taking of property without due process of law and compensation properly raised and decided in the Arkansas Supreme Court therefore vesting this Court with jurisdiction. .

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QUESTION PRESENTED i

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McIlroy and James Dunlavey, As Executor of The Estate of Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Wayfarer Expeditions, Inc., respectfully requests that the Petition for Writ of Certiorari filed herein by the Petitioners be denied.

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction to review the questions presented in their petition under 28 U.S.C. §1257(3). This respondent challenges the contention of Petitioner that this is a case which is a proper matter for review by Writ of Certiorari. This case does not question the validity of a treaty or statute of the United States nor is the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States. Wayfarer submits that the alleged Federal

constitutional issue was inserted as a mere afterthought in the Petition for Rehearing filed by the Petitioners in the Arkansas Supreme Court on or about April 2, 1980. The Petition for Rehearing was denied on April 21, 1980. Wayfarer submits that by reason thereof the issue of violation of Fifth Amendment or Fourteenth Amendment rights as guaranteed by the United States Constitution were simply not raised nor litigated before the Franklin County Chancery Court nor the Arkansas Supreme Court. Furthermore, Wayfarer submits that there is not any conflict between the decisions herein cited and any prior decisions of the Arkansas Supreme Court; in fact, prior decisions of the Arkansas Supreme Court are completely and totally consistent with the result reached below. Therefore, this Respondent respectfully submits that this case does not present a proper matter for review by this Court by a Writ of Certiorari and the Petition should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3):

By Writ of Certiorari, whether validity of a treaty or statute to the United States is drawn in question or whether validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

COUNTERSTATEMENT OF THE CASE

This litigation involves the navigability of the Mulberry River, a free-flowing and undammed Arkansas river rising in the Boston Mountains of Franklin County and flowing westerly a distance of 70 miles until it flows into the Arkansas River. Functionally, the Mulberry River may be termed as a typical clear water Ozark river having a rock and gravel bottom and populated by a variety of fish. The width and depth of the river varies. Generally, the Mulberry River has been utilized by the general public for recreational activities consisting of fishing, swimming, boating, and picnicking for a great number of years. The river has been canoed for some number of years and has relatively recently become quite popular with canoeists.

In 1967, the Petitioners acquired real property through which the streambed of the Mulberry River flows. At the point in issue, Petitioners own both sides of the river at that certain point where a concrete Franklin County bridge serves county road 219. The McIlroy property lies within the Ozark National Forest. This action originated when Petitioner filed an action for declaratory judgment praying for a Court order declaring the Mulberry River to be non-navigable at that point where it crosses the Petitioner's property. Petitioners sought a permanent restraining order prohibiting the Respondents and the public from floating or canoeing on the Mulberry River at the point where it crosses Petitioner's property. Respondents allege that, at the point in issue, the river was navigable and that the public had acquired the right to cross Petitioner's property by virtue of its having acquired a prescriptive easement by usage of the river in excess of seven years.

The Respondent, Wayfarer Expeditions, Inc., is a

Missouri corporation engaged in the business of renting canoes and offering a shuttle service along the Mulberry River in the State of Arkansas. The Ozark Society is a private non-profit conservation organization. The State of Arkansas intervened on the grounds that a declaration of of non-navigability would divest the State of title to the streambed and foreclose the public's right to use the Mulberry River.

This matter was tried before the Franklin County Chancery Judge who held that the Mulberry River is non-navigable, and, that the public had not acquired a prescriptive easement along the river upon the Petitioner's property. The Arkansas Supreme Court reversed on appeal, finding that the Mulberry River is navigable at that place where it flows through the Petitioner's lands with all incidental rights of that determination. After the adverse ruling by the Arkansas Supreme Court, Petitioners filed a Petition and Memorandum Statement requesting a rehearing before the Arkansas Supreme Court in which it was first alleged that Petitioner had been divested of title to property without due process of law and without compensation. Petitioner alleged that the ruling was contrary to the United States Constitution and to the Arkansas Constitution without specifying which portions of the United States Constitution or the Arkansas Constitution were relied on. After the Petition for Rehearing was denied by the Arkansas Supreme Court, Petitioners filed this instant action seeking a Petition for Writ of Certiorari to the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

It has always been deemed to be essential to the jurisdiction of this Honorable Court under 28 U.S.C. §1257 (3) that a substantial Federal question has been properly raised in the State court proceedings. As stated in *Oxley Stave Co. v. Bulter County,* 166 U.S. 648 (1897) at page 655:

> ". . . the jurisdiction of this Court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such Court intended to assert a Federal right."

It is submitted that the questions now presented to this Court were never properly raised before the Franklin County Chancery Court nor before the Arkansas Supreme Court on the merits of the appeal. The issue arises, if at all, only by way of Petitioner's Petition for Rehearing to the Arkansas Supreme Court. This deficiency in and of itself is an adequate and compelling reason to deny the Petitioner's Writ of Certiorari. It has long since been established that the United States Supreme Court is vested with no jurisdiction unless a Federal question was raised and decided in the State court below. See generally, *Crowell v. Randall,* 10 Pet. 368 (1836); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). It is undisputed that in Arkansas, an issue which is not been pleaded in the pleadings nor heard by the trial court will not be determined nor considered by the Arkansas Supreme Court for the first time on appeal. *Desha Bank & Trust Co. v. Quilling,* 118 Ark. 114, 176 SW 132 (1915); *Stroud v. Crow,* 209 Ark. 820, 192 SW2d 548 (1946).

Even if the issues raised may be deemed to be properly submitted to this Court, Wayfarer submits that there is no existing conflict in Arkansas decisions and that the matter must be affirmed on the merits. The Supreme Court found the Mulberry River as it passes through Petitioners' property, to be navigable as a matter of law. The attention of this Court is directed to the opinion of the Arkansas Supreme Court's set forth in Petitioner's Appendix at page A-8 where it observed that Arkansas has adopted the standard definition of navigability, citing *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930). The Supreme Court observes that the test is similar to the one in usage in Federal courts and serves to define navigability in terms of a river's "potential for commercial usefulness. . . ." Thereafter, *Lutesville Sand & Gravel Co. v. McLaughlin, supra* above, is cited as follows:

> ". . . Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense, it is

> navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round."

The Arkansas Supreme Court thereafter concludes at A-9 of Petitioner's Appendix that, "therefore, a river is legally navigable if actually navigable and actually navigable if commercially valuable.

In logical sequence, the Arkansas Supreme Court then cites *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915) in recognition of the fact that rivers and the utilization of rivers would change in the future and that quite probably recreation would become of significant impact to the people and to the industries in Arkansas. In citing *Barboro,* the Arkansas Supreme Court observed the prophetic impact of the language, establishing a standard definition of navigability with its resulting dependence upon a commercial criteria. Appended at the Petitioner's brief at pages A-9 to A-10 the Court quotes *Barboro* as saying:

> "It is the policy of this State to encourage the use of its water courses for any useful or beneficial

purpose. There may be other public uses than the carrying on of commerce of pecuniary value. The culture of rice is being developed in this State and the waters of the lake could be used for the purpose of flooding the rice fields and for other *AGRICULTURAL PURPOSES*. As the population of the State increases, the banks of the lake may become thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. *MOREOVER, THE WATERS OF THE LAKE MIGHT BE USED TO A MUCH GREATER EXTENT — FOR BOATING, FOR PLEASURE, FOR BATHING, FISHING AND HUNTING THAN THEY ARE NOW USED.*" [Emphasis added].

It is beyond dispute that Wayfarer is a Missouri corporation doing business in the State of Arkansas. Wayfarer's business has extra state ramifications and clearly constitutes, as a matter of common sense, a form of interstate commerce. Clearly any river which is susceptible to canoeing and other recreation activities is economically useful and, as a matter of fact, susceptible to and engaged in the business of interstate commerce. It is submitted that other states utilize susceptible recreational use of a river or streambed as a criteria for the establishment of navigability. See, *Attorney General v. Woods,* 108 Mass. 436 (1870); *State, ex rel. v. Newport Concrete Co.,* 44 Ohio App. 2d 121, 73 Ohio Ops. 2d 124 (1975); *Kelly, ex rel. MacMullan v. Hallden,* 51 Mich. App. 176, 214 NW2d 856 (1974); *People v. Mack,* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds,* 153 Ore. 625, 56 P.2d 1158 (1936);

Branch v. Oconoto County, 13 Wis. 2d 595, 109 NW2d 105 (1961); *Curry v. Hill,* 460 P.2d 933 (Okla. 1969); *State v. Twiford,* 136 N.C. 603, 48 SE 586 (1904).

Inasmuch as Petitioners acquired their disputed title to the riverbed sometime after the decision in *Barboro v. Boyle,* supra above, and *Lutesville Sand & Gravel Co. v. McLaughlin,* supra above, it is submitted that Petitioner has lost nothing, has not been divested of title to the streambed, and, accordingly, cannot meritoriously argue the issue of the taking without just compensation.

Thus this Respondent respectfully submits that Petitioner's rights under the Fifth Amendment to the United States Constitution were in no way infringed by the action of the Supreme Court of Arkansas. Furthermore, this Respondent submits that the Petitioners have failed to establish jurisdiction in this Court pursuant to 28 U.S.C. 1257(3).

CONCLUSION

For all the above reasons, the Petition for Writ of Certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. Penix, Jr., a member of the bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing brief of Respondent, Wayfarer Expeditions, Inc., have been served by mail by depositing the same in a United States mailbox with first class postage, prepaid, this —— day of August, 1980 duly addressed to the following: Thomas A. Martin, Jr. Esquire, Bay Fitzhugh, Esquire, Paul Means, Esquire, Howard Cockrill, Esquire, Jack T. Lassiter, Esquire and Ronald W. Metcalf, Esquire on August ——, 1980, at the addresses listed on pleadings previously filed with this Court.

/s/ James A. Penix, Jr.

OF JAMES A. PENIX, JR., P.A.

Counsel of record for Respondent, Wayfarer Expeditions, Inc.